

Capital Reporting Company
Arbitration - Volume III 08-02-2010

AUG 17 2010

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BEFORE THE UNITED STATES COPYRIGHT ROYALTY JUDGES
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IN THE MATTER OF: : Docket No. 2009-1
: CRB Webcasting III
DIGITAL PERFORMANCE RIGHT in :
SOUND RECORDINGS and : REBUTTAL PHASE
EPHEMERAL RECORDINGS. : Volume 3
-----: (Pages 307 - 496)

Washington, D.C.

Monday, August 2, 2010

The following pages constitute the
Rebuttal Phase in the above-captioned matter at the
Library of Congress, Madison Building, 101
Independence Avenue, Southeast, Washington, D.C.,
before Vicky Reiner, RMR, CRR, of Capital
Reporting Company, a Notary Public in and for the
District of Columbia, beginning at approximately
9:30 a.m. when were present on behalf of the
respective parties:

1 A P P E A R A N C E S

2 Copyright Royalty Tribunal:

3 CHIEF JUDGE JAMES SLEDGE
JUDGE WILLIAM ROBERTS
4 JUDGE STANLEY C. WISNIEWSKI
Library of Congress
5 Madison Building
101 Independence Avenue, Southeast
6 Washington, D.C. 20540

7 On behalf of SoundExchange, Inc.:

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GARRETT A. LEVIN, ESQUIRE
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2 On behalf of Live365, Inc.: (Continued)

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16 ALSO PRESENT:

17 Colin Rushing
18 Susan Chertkof
19 Michael J. Huppe

20

21

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C O N T E N T S

WITNESS:	DIRECT	CROSS	REDIRECT	RECROSS
JANUSZ ORDOVER	311	356		
KYLE FUNN	428	452, 480	484	485
SOUNDEXCHANGE REBUTTAL EXHIBITS: *				
Number 45				330
Number 46				436

LIVE365 REBUTTAL EXHIBITS: *	MARKED	RECEIVED
Number 3		463

(*Exhibits retained.)

1 P R O C E E D I N G S

2 CHIEF JUDGE SLEDGE: Everyone looks chipper
3 this morning. I suspect that's a reflection of the
4 weekend and the cool weather.

5 Mr. Handzo, I think you're in the barrel
6 this morning.

7 MR. HANDZO: I am, Your Honor.
8 SoundExchange will begin its rebuttal testimony with
9 the testimony of Dr. Ordover.

10 CHIEF JUDGE SLEDGE: All right, sir. Please
11 raise your right hand.
12 Whereupon,

13 JANUSZ A. ORDOVER
14 was called as a witness, and, having first been duly
15 sworn, was examined and testified as follows:

16 DIRECT EXAMINATION

17 BY MR. HANDZO:

18 Q Good morning. Would you introduce yourself
19 to the Court, please.

20 A My name is Janusz Ordover. I am professor
21 of economics at New York University.

22 Q I think for the benefit of the court

1 reporter, we're going to need you to spell both your
2 first and last name.

3 A It's J-A-N-U-S-Z, middle initial A, last
4 name is Ordoover. O-R-D-O-V-E-R.

5 Q Dr. Ordoover, what is your educational
6 background?

7 A I have a Ph.D. in economics from Columbia
8 University. I studied at McGill before that. Warsaw
9 University before that.

10 Q Where are you currently employed?

11 A I'm at New York University. I've been there
12 for 37 years.

13 Q And what do you teach?

14 A I teach economics. Essentially two fields,
15 industrial organization economics and international
16 trade.

17 Q Can you tell us the highlights of any prior
18 employment or any employment that you've had while
19 you've been at NYU.

20 A Well, I have taught at a number of
21 universities in the United States and also in Italy.
22 And during the period of '91 to '92, I was the deputy

1 assistant attorney general for economics in the
2 Department of Justice, US Department of Justice.

3 Q Have you published any peer reviewed papers
4 in the area of industrial organization economics?

5 A Yes. The answer is yes. And in other areas
6 as well. Probably about 100 by now peer reviewed and
7 chapters in books and so on.

8 Q Have you testified previously in court?

9 A Yes.

10 Q How many times as an expert witness?

11 A Probably around 10, maybe 15 times over the
12 past 25 years.

13 Q Have you testified previously before this
14 court?

15 A Yes, I had the pleasure of doing so 2 years
16 ago, in fact.

17 Q In what matter?

18 A It was the SDARS matter.

19 Q Have you also testified before Congress or
20 federal agencies?

21 A Yes. I testified before Congress on
22 intellectual property rights issues, as well as in

1 front of the Federal Trade Commission and the
2 Department of Justice during a variety of hearings
3 that those institutions held over the time.

4 Q And with respect to economics generally,
5 what is your area of expertise?

6 A Most of my work nowadays is focused on
7 industrial organization economics, with various
8 subfields of that, such as antitrust economics and
9 regulation economics.

10 But over the years, I have taught also
11 public finance, mathematical economics and other
12 subject areas. Now I also teach pure theory of
13 international trade. I've done that over the last
14 15 years or so.

15 Q Dr. Ordover, in the course of your career,
16 have you done any work in the music business?

17 A Well, I have done a fair amount of work in
18 the music business. I have coauthored a -- well, I
19 was an expert for Sony and BMG in connection with
20 their joint venture. Of course I testified here as
21 well on the issue of licensing fees for music.

22 I have advised the various recording

1 studios on their -- some of their business
2 strategies. And I have -- many, many years ago I
3 became involved in the issues of copyrights for new
4 technologies. There was a commission called CONTU
5 for which I and others prepared a very lengthy
6 report about the evolution of property rights and
7 the new technology of the area.

8 MR. HANDZO: Your Honor, I would offer
9 Dr. Ordoover as an expert in industrial organization
10 economics.

11 CHIEF JUDGE SLEDGE: Any objection to the
12 proffer?

13 MR. MacDONALD: No objection, Your Honor.

14 CHIEF JUDGE SLEDGE: No objection. The
15 proffer is accepted.

16 MR. HANDZO: May I approach, Your Honor?

17 CHIEF JUDGE SLEDGE: Yes, sir.

18 BY MR. HANDZO:

19 Q Dr. Ordoover, I'm showing you what we've
20 marked as SoundExchange Trial Exhibit 45. Can you
21 identify that for us?

22 A Yes. This is a written rebuttal testimony

1 which I prepared for this hearing, for this matter,
2 actually.

3 Q And if you would turn, please, to page 29.

4 A Yes.

5 Q Is that your signature?

6 A Yes, it is.

7 Q Do you have any changes or corrections that
8 you would like to make to your testimony?

9 A Not as I sit here now.

10 Q Is it true and accurate?

11 A Yes.

12 MR. HANDZO: Your Honor, I would move the
13 admission of SoundExchange Trial Exhibit 45.

14 CHIEF JUDGE SLEDGE: Any objection to
15 Exhibit 45?

16 MR. MacDONALD: Yes, Your Honor.

17 CHIEF JUDGE SLEDGE: All right.

18 MR. MacDONALD: Live365, Your Honor, objects
19 to the admissibility of the written rebuttal testimony
20 of Dr. Ordover.

21 Specifically, we object to the admission
22 of sections IV.D and IV.E, which appear on pages 18

1 to 27 of Dr. Ordoover's written testimony, as well as
2 paragraphs 7.C and 7.D, which appear at pages 5 and
3 6. Those paragraphs provide an introductory summary
4 of the contents in sections IV.D and IV.E.

5 Live365 seeks to exclude those portions
6 of Dr. Ordoover's testimony on two separate and
7 independent grounds. The first basis for our
8 objection, Your Honors, is that these portions of
9 Dr. Ordoover's testimony exceed the permissible scope
10 of rebuttal testimony. None of these portions
11 rebuts anything presented during the direct phase of
12 the hearing. To the contrary, and as Dr. Ordoover
13 confirmed at his deposition a few weeks ago, those
14 sections reflect Dr. Ordoover's independent
15 commentary about theoretical issues that were
16 separate and apart from evidence presented at the
17 direct phase.

18 The second basis of our objection, Your
19 Honors, which is an independent ground, is that the
20 discussion contained in those portions are based on
21 nothing more than speculation and facts that have
22 not been admitted or will be admitted into evidence.

1 And I'm happy to, Your Honors, to delve
2 further into my two objections if you would like to
3 hear them further.

4 JUDGE ROBERTS: Mr. MacDonald, you said that
5 was D and E as well?

6 MR. MacDONALD: Yes, Judge Roberts.

7 JUDGE ROBERTS: So that would be page 18
8 through page 27?

9 MR. MacDONALD: I think it would comprise --
10 yes. That's correct, Your Honor.

11 JUDGE ROBERTS: All right. And then plus
12 the two bullet points on 5 and 6?

13 MR. MacDONALD: Correct. If I may continue,
14 Your Honors.

15 CHIEF JUDGE SLEDGE: All right.

16 MR. MacDONALD: Dr. Fratrik is the expert
17 who Dr. Ordoover purports to rebut. And Dr. Fratrik
18 has a four-page discussion at the end of his report
19 about the problems with the NAB deal, in terms of that
20 deal being a benchmark for this proceeding.

21 In that discussion, Dr. Fratrik provides
22 three specific, and only three reasons why the NAB

1 deal -- three reasons in support of his discussion
2 about the problems with the NAB deal.

3 The first has to do with the different
4 cost and revenue structures of NAB. The second has
5 to do with the threat of litigation. The third has
6 to do with the value of the performance complement
7 waiver.

8 And section IV of Dr. Ordoover's report,
9 which begins at page 14, contains five arguments.

10 The first three arguments of section IV
11 of Dr. Ordoover's report, sections IV.A, IV.B, and
12 IV.C, directly correspond to the three arguments
13 that Dr. Fratrik raises in his discussion in his
14 report about the NAB deal.

15 And in fact, for each of those first
16 three arguments, Dr. Ordoover has a lead-in sentence
17 that goes something like "Dr. Fratrik's first
18 contention," and then he explains the contention and
19 then starts rebutting that contention. The same
20 with the second argument, IV.B, starts with
21 "Dr. Fratrik's second argument is" so-and-so.
22 Something similar with respect to the third

1 argument.

2 And for each of these arguments,
3 section IV.A, IV.B and IV.C, there are citations to
4 Dr. Fratrik's report, the direct testimony, the
5 trial testimony.

6 Then we get to section IV.D and IV.E.
7 These are brand-new arguments. They were never
8 addressed by Dr. Fratrik. Not surprisingly, there's
9 absolutely no references to Dr. Fratrik's written
10 testimony, his verbal testimony or even his name.

11 This is in contrast, as I mentioned, to
12 sections IV.A, IV.B, and IV.C.

13 And even in his written testimony at
14 pages 5 and 6, those introductory paragraphs,
15 Dr. Ordoover even describes these two arguments,
16 section IV.D and IV.E, in his words, as theoretical
17 issues.

18 Most significantly, Your Honors,
19 Dr. Ordoover admitted in his recent deposition that
20 these sections were unrelated to what Dr. Fratrik
21 said in his direct phase. At that deposition, I
22 asked Dr. Ordoover if these arguments, which we seek

1 to exclude here, were, quote, separate and apart
2 from what Dr. Fratrik had submitted in his testimony
3 in this proceeding.

4 Dr. Ordoover responded yes.

5 Dr. Ordoover further stated that he
6 commented independently on the issue of relevance of
7 the NAB rates.

8 By the way, Your Honors, I have copies
9 of the relevant sections -- excerpts of
10 Dr. Ordoover's deposition if you would like to have
11 your own copies.

12 If anything, section IV.D and IV.E
13 serves to bolster arguments that SoundExchange
14 itself raised through Dr. Pelcovits at the direct
15 phase. And for those reasons, Your Honor, I would
16 humbly submit that sections IV.D and IV.E, as well
17 as the corresponding introductory paragraphs, do not
18 constitute rebuttal testimony.

19 I have that second argument about
20 speculation grounds. I'm happy to launch into that
21 as well.

22 CHIEF JUDGE SLEDGE: Go ahead. Go ahead.

1 MR. MacDONALD: Okay. Real briefly, Your
2 Honor, separate and apart from the outside the scope
3 of rebuttal testimony is just -- the section D and E
4 is largely -- entirely based on speculation and not
5 facts that have been admitted into testimony or will
6 be admitted into testimony. There are numerous
7 sections in this -- in these two sections -- sorry,
8 numerous sentences that reveal the speculative nature
9 of those two sections. I'm happy to point the Court
10 to several examples, including, in paragraphs 35,
11 which is on page 19 of Dr. Ordovery's report,
12 paragraphs 43, page 22. And I'll even read one of the
13 sentences here, or at least point the Court to one of
14 the sentences. It's in the middle of the paragraph,
15 the one that says "in other words." It says, "In
16 other words, the concern might be that the negotiated
17 rates include a premium attributable to the
18 hypothesized incremental bargaining advantage in the
19 hands of SoundExchange." When I asked --

20 JUDGE ROBERTS: Mr. MacDonald --

21 MR. MacDONALD: Yes.

22 JUDGE ROBERTS: -- didn't Dr. Salinger do

1 the very same thing?

2 MR. MacDONALD: To the extent Dr. Salinger
3 did the very same thing, I think Your Honors excluded
4 those portions.

5 JUDGE ROBERTS: Where he described in theory
6 what he thought was operating? I don't remember us
7 excluding all provisions in his testimony related to
8 what was offered as supposed speculation:

9 MR. MacDONALD: Well, Your Honors, I recall
10 that there were portions of his testimony that were
11 excluded based on speculative grounds or based on
12 speculated facts.

13 JUDGE ROBERTS: There were some. But not --
14 certainly we didn't go through and eliminate all. So
15 I'm just wondering if there's a difference between
16 what Dr. Ordoover is doing here as opposed to
17 Dr. Salinger.

18 MR. MacDONALD: I think there are
19 differences, Your Honor.

20 JUDGE ROBERTS: Well, what are they then?

21 MR. MacDONALD: Well, he cited evidence for
22 those sections that are actually cites to either

1 evidence that's in testimony or evidence that was --

2 JUDGE ROBERTS: You mean Dr. Salinger did?

3 MR. MacDONALD: Yes. Dr. Salinger. I'm
4 sorry. And one other distinction I would note is that
5 those other sections weren't objected to. To the
6 extent there were any speculative grounds, I would
7 expect SoundExchange's attorneys to object to those
8 portions.

9 And, also, Dr. Pelcovits was addressing
10 certain theoretical issues in his direct statement
11 that Dr. Salinger was then responding to.

12 And, Your Honor, just -- just to sort of
13 wrap up the thought on the speculative. As I
14 mentioned earlier, Dr. Ordoover refers to these
15 sections as theoretical issues. Those are at
16 paragraphs 7.C and 7.D. And, again, they contain a
17 noticeable lack of factual support. These sections
18 cite theories but no admitted facts. At the end of
19 the day it's really just sheer speculation by
20 Dr. Ordoover.

21 As Your Honors ruled last week, expert
22 opinions based on speculated facts would not be

1 permitted. I would suggest that the same holds true
2 with respect to the sections that Live365 seeks to
3 exclude here.

4 CHIEF JUDGE SLEDGE: Thank you.

5 Any response?

6 MR. HANDZO: Yes, Your Honor. Actually I'm
7 going to make this a little easier. I don't object to
8 striking 7.C and -- paragraph 7.C and section IV.D. I
9 do object to --

10 CHIEF JUDGE SLEDGE: IV.D.

11 MR. HANDZO: IV.D is the section that
12 begins, I believe, on page 18.

13 CHIEF JUDGE SLEDGE: All right.

14 MR. HANDZO: And 7.C is the corresponding
15 introductory paragraph. I do, however, object to
16 striking the balance of it.

17 With respect to the issue of whether it
18 is proper rebuttal, Dr. Fratrik actually does
19 address market power issues in his testimony.

20 JUDGE ROBERTS: Hold on a second,
21 Mr. Handzo. You do not object to page 18, subsection
22 D.

1 MR. HANDZO: Correct.

2 JUDGE ROBERTS: But you do object to
3 subsection E.

4 MR. HANDZO: Correct.

5 JUDGE ROBERTS: And you're okay on the intro
6 of striking C as that relates to D?

7 MR. HANDZO: Correct.

8 JUDGE ROBERTS: Fair enough.

9 MR. HANDZO: With respect to paragraph 7.D
10 and section IV.E, which addressed market power issues,
11 Dr. Jaffe did in fact raise market power issues in his
12 testimony at page 32.

13 JUDGE WISNIEWSKI: You mean Dr. Fratrik?

14 MR. HANDZO: I'm sorry. Dr. Fratrik.
15 Excuse me. They were raised, I will say in a somewhat
16 different context. He wasn't talking specifically
17 about the NAB deal there. He was talking about market
18 power more generally. But he certainly did raise
19 those issues. And so I think it's fair to respond in
20 the context of the NAB.

21 With respect to the idea that somehow
22 this is all speculation, I certainly disagree. What

1 you have in Dr. Ordovery's testimony in section IV.E
2 is he states certain facts. For example, fact, that
3 SoundExchange negotiated on behalf of the record
4 companies in the NAB deal. And then he goes on to
5 discuss, well, what as a matter of economics do we
6 make of that fact.

7 It's a fact that on the other side of
8 the table the NAB was negotiating for all of the NAB
9 companies. So what as a matter of economics do we
10 make of that fact?

11 It is a fact that in this negotiation
12 what we were talking about was whether the
13 terrestrial broadcasters can essentially rebroadcast
14 their signal over the Internet and what effect does
15 that have on whether the record companies'
16 portfolios are complements or substitutes.

17 So he's taking a set of facts and he is
18 addressing what as a matter of economics one would
19 do with those facts. That's exactly what experts
20 do. I think it's actually got more facts in it than
21 Dr. Salinger's had. I think it's perfectly
22 appropriate. So I would object to striking that

1 section of his testimony.

2 CHIEF JUDGE SLEDGE: All right. Any
3 questions?

4 Any response to that?

5 MR. MacDONALD: Yes, Your Honors, if I may.
6 Very briefly. The discussion about market power that
7 Dr. Fratrick undertakes has nothing to do with
8 SoundExchange. I'm talking about the record labels,
9 the four major record labels, and it talks about the
10 HHI index. It doesn't talk about SoundExchange. It
11 certainly doesn't talk about with respect to the NAB
12 deal. Just about the four record labels.

13 I think that's a very, very key
14 distinguishing factor with respect to what
15 Mr. Handzo is saying.

16 Secondly, as to Mr. Handzo's statement
17 about facts, I don't see the citations to any facts.
18 I see a few citations to the Web II hearing,
19 including the first footnote in that section E,
20 footnote 52 cites Robert Roback's testimony. That's
21 Web II. And then the other citation, I see a
22 citation to an article about patent holdup and

1 royalty stacking. But I simply don't see any facts.

2 I actually don't see the distinction
3 Mr. Handzo is making with respect to section D and
4 section E. If section D is -- is grounds for
5 exclusion, even a voluntary exclusion, I certainly
6 don't see why section E shouldn't be subject to a
7 similar exclusion for all the reasons that I stated
8 earlier, Your Honor. I'll just keep my comments to
9 that.

10 CHIEF JUDGE SLEDGE: All right. We'll
11 recess.

12 (Whereupon, a recess was taken between
13 9:52 a.m. and 10:16 a.m.)

14 CHIEF JUDGE SLEDGE: Well, to a bystander,
15 none of whom are present, it would appear that we are
16 very slow in our progress in these things. But these
17 preliminary questions are important and show how
18 important it is to get appropriate evidence,
19 especially from experts.

20 Having reviewed the targeted portions of
21 Dr. Ordoover's testimony, we're persuaded that the --
22 that the provisions in section E do not rise to the

1 level of speculation as we found in Dr. Salinger's
2 testimony, and that in paragraph 43, there are facts
3 that are set out on which the discussion is
4 presented. And these facts are not assumptions but
5 are facts that are based on the evidence in the
6 case.

7 We think that the issue on rebuttal is a
8 very close question. And we think that the
9 discussion by Dr. Fratrik on market power on
10 pages 32 and 33, as he references and analyzes the
11 testimony from Dr. Jaffe, and the discussion on the
12 NAB settlement on pages 40 through 44, are --
13 sufficiently raise the points discussed in paragraph
14 E that this is -- does satisfy the requirements for
15 rebuttal, if just barely.

16 So the objection is overruled.

17 With that ruling, the exhibit is
18 admitted with the exclusion of section D and the
19 introduction to section D and 7.C.

20 Mr. Handzo.

21 (SoundExchange Exhibit Number 45 was
22 received into evidence.)

1 MR. HANDZO: Thank you, Your Honor.

2 BY MR. HANDZO:

3 Q Dr. Ordover, what were you asked to do in
4 this case?

5 A My assignment was twofold. First, I was
6 supposed to comment and critique Dr. Fratrik's
7 development of the appropriate rate in this proceeding
8 based on the model he constructed of the typical
9 webcaster.

10 And second, I was asked to address some
11 of Dr. Fratrik's objections to the use of NAB rates
12 as being probative for the finding of what the rate
13 ought to be in this proceeding.

14 Q Now, with respect to that first task, that
15 is addressing the model that Dr. Fratrik proposed in
16 his testimony, what did you find to be the principal
17 flaws, if any, with that model?

18 A Well, I found several problems with the way
19 he approached the task. Number 1, the most important
20 one to me was that he treats the synergistic or the
21 unitary webcaster, like Live365, as being composed of
22 two separate parts, the webcasting part and the

1 broadcast services part. And I believe that this
2 approach is incorrect with sound economics.

3 I also found that his use of the
4 20 percent margin which Live -- is it okay if I call
5 them Live as opposed to Live365? I don't think
6 anybody will be offended. The 20 percent variable
7 cost margin that Live is supposed to earn, to be
8 unsupported by evidence, and whatever evidence
9 Dr. Fratrik adduces, i.e., by relying on some
10 calculations from the terrestrial sector, I do not
11 think are adequate to support his claim of the right
12 margin.

13 So those are the major ones.

14 Q Okay. Let me ask you to turn, Dr. Ordoover,
15 to paragraph 12 of your testimony.

16 A Yeah.

17 Q And do you see there at the beginning of
18 paragraph 12, you talk about Dr. Fratrik's starting
19 point being the assumption that Live365 is a typical
20 webcaster?

21 A Yes, sir.

22 Q And did you agree with that assessment?

1 A No. As I just noted, to begin with, I don't
2 believe that Live365 is a typical webcaster.
3 Probably, more generally, I don't believe there is
4 such a thing as a typical webcaster, having spent a
5 fair amount of time surfing the web and listening to
6 various webcasters that are available to the public
7 now.

8 Q Okay. And why is it that you don't believe
9 there is a typical webcaster?

10 A Well, as I summarize or report in my report,
11 there are a variety of webcasters, ranging from
12 simulcasters, as represented by NAB in these
13 negotiations, all the way to webcaster like Live which
14 offers from my perspective three types of services.
15 One, it interacts with the listeners, then it
16 interacts with advertisers, and also it interacts with
17 programmers. So it's a three-sided platform.

18 And in between you have custom radio.
19 You have webcasters whose only business is
20 webcasting. And there are varieties of each one of
21 those as we see on the web, plenty of different
22 webcasters.

1 Q You just mentioned that you view Live as
2 sort of a three-sided platform. What do you mean by
3 that?

4 A This is the current fashion in economics, at
5 least some part of economics, is to talk about
6 platforms as being organizations or firms or
7 technologies that enable different sides or different
8 groups of customers to interact with each other
9 mediated by this thing called the platform.

10 So we have credit card platforms, we
11 have operating system software platforms. And in
12 this case we have an example with a very interesting
13 platform, which is Live365, that organizes
14 interactions between programmers, those who program
15 the radio stations, the listeners who want to listen
16 to these programmed radio stations, and, also,
17 advertisers, who are in part trying to sell their
18 product to their listeners and are willing to pay
19 for it.

20 So we have a three-sided platform.
21 Often people talk about two-sided platforms. But
22 now we are in the more sophisticated world of

1 three-sided platforms.

2 The interesting thing about these
3 platforms is that pricing on platforms is actually
4 quite -- could be quite complicated.

5 In this case, we see that Live365, like
6 some other webcasters, offers free music to
7 listeners, but charges advertisers and the
8 programmers. And it also has a small business, I
9 understand, of subscription service, where it also
10 charges the listeners as well. So you have a very
11 complicated pricing model.

12 But often the platforms are
13 characterized by zero pricing on one side of the
14 platform and positive pricing on the other side of
15 the platform. We see that here.

16 MR. MacDONALD: Your Honor, I move to strike
17 the previous response as being outside the scope of
18 his written testimony. Dr. Ordoover never talks about
19 a platform, much less a three-sided platform. There's
20 simply nothing in his testimony that supports his
21 verbal testimony that he just provided.

22 For that basis, I move to strike.

1 CHIEF JUDGE SLEDGE: Mr. Handzo.

2 MR. HANDZO: Your Honor, if you look at
3 paragraph 14 of Dr. Fratrik's testimony, he doesn't
4 use the word "platform" but he talks about the wholly
5 integrated synergistic nature of Live365's business,
6 which I think is precisely what he's addressing here
7 when he's talking about platform. I'm happy to
8 explore that a little further if it would help.

9 THE WITNESS: May I make one correction?
10 You referenced me as Fratrik.

11 MR. HANDZO: I'm sorry.

12 CHIEF JUDGE SLEDGE: Mr. MacDonald.

13 MR. MacDONALD: Your Honor, I mostly defer
14 to my previous response. I just don't see any
15 discussion about a three-sided platform. What I heard
16 Dr. Ordoover verbally testify to as a three-sided
17 platform was the webcasting services, the advertising
18 services and the subscription services.

19 But I don't see anything related to the
20 advertising services. In fact, at most, I see
21 reference to two components of Live365's business,
22 but certainly nothing that would indicate this

1 three-sided platform that Dr. Ordoover was just
2 testifying about.

3 And in the final sentences of
4 Dr. Ordoover's verbal testimony had to do with
5 pricing, and how complicated pricing could be and
6 there's this zero pricing. I don't see anything
7 about that with respect to the description of
8 Live365 in paragraph 14.

9 CHIEF JUDGE SLEDGE: Mr. MacDonald, this is
10 an instance where I think that paragraph 14 makes
11 references to the points targeted with an addition as
12 a result of the confusion of the bench on Live365's
13 business, as demonstrated by our direction that you
14 file a clarification as to what your business is at
15 the end of the direct. I'm going to overrule that
16 objection.

17 MR. MacDONALD: Thank you, Your Honor.

18 BY MR. HANDZO:

19 Q Dr. Ordoover, in paragraph 14, you refer to
20 Live's business as wholly integrated, synergistic?

21 A Yes.

22 Q What do you mean by that?

1 A Well, what I mean by it -- I don't know if I
2 can use the word "platform" again without creating
3 more problems. But what I mean by it is Live365
4 offers a business model that enables interaction
5 between the radio stations, which program the music,
6 and listeners, mediates that interaction, and thereby
7 it offers a business model that cannot function unless
8 it has listeners. Because if it doesn't have
9 listeners, it will not have any independent radio
10 stations wanting to sign up with it. And it will not
11 have any independent radio stations willing to sign up
12 with it if it does not have listeners.

13 So it is, as a concept, is a unitary or
14 synergistic operation that tries to gain listeners
15 and tries to gain radio stations in order to
16 generate a -- to make a platform that is valuable to
17 both sides. And obviously also to advertisers.

18 Q Okay. Now, in light of your opinion that
19 this is a wholly integrated synergistic business, what
20 is your view of Dr. Fratrik's attempt to model only
21 part of the business and not the other part?

22 A Well, my view is what I stated in my written

1 testimony, which is I think it's flawed. You have to
2 look at Live365 as a synergistic business. And this
3 artificial division of sources of revenues and the
4 generations of costs I think confuses because it's, in
5 many ways, arbitrary. And, therefore, I prefer to
6 look at it as a synergistic unitary business of
7 being -- facing different clienteles. I describe
8 three clienteles.

9 Q Okay. Now, let me ask you to turn,
10 Dr. Ordoover, to paragraph 21 of your testimony.

11 A Yep.

12 Q And there you talk about Dr. Fratrik's
13 selection of the 20 percent floor in his model?

14 A Yes.

15 Q Can you just refresh our recollection what
16 Dr. Fratrik was doing there?

17 A My understanding is that in order to get the
18 rate, appropriate rate, he needs to pin down one
19 variable besides all the data that he has. And the
20 variable he needs to pin down is what we would refer
21 to as a variable cost margin, which is basically the
22 percentage difference between the revenues and

1 variable costs divided by the flow of revenues.

2 And he claims that that margin, Your
3 Honors, has to be 20 percent in order for Live365 to
4 be viable or to earn what he considers to be a
5 target rate -- target margin that I presume would be
6 consistent with keeping it alive and being able to
7 draw enough resources to continue as a viable
8 operation.

9 Q And do you agree with Dr. Fratrik's use of
10 20 percent operating margin in his model?

11 A As I stated in my report, I do not. I don't
12 find enough support in what he says for the 20 percent
13 rate. If my recollection is right, I think he relies
14 on the margins that he obtained from the terrestrial
15 broadcasting industry, which is in many respects quite
16 different from the webcasting industry, and thereby
17 does not necessarily offer the right benchmark for
18 calculating the appropriate variable cost margin.

19 JUDGE ROBERTS: Is there an operating margin
20 percentage that you think is appropriate for the
21 webcasting industry?

22 THE WITNESS: Your Honor, I would have to

1 say no, in part because I was not given that
2 assignment to investigate it. But also, more
3 generally, again speaking as an industrial
4 organization economist, I do believe that whatever --
5 what the appropriate margin might be would likely
6 differ across the broad range of the webcasters that
7 are currently operating.

8 So some may require higher than
9 30 percent, 20 percent. Others may be satisfied
10 with less than 20 percent.

11 Because, for example, some webcasters
12 may incur extremely low fixed costs. The webcaster
13 who rents all of the web servers and thereby has no
14 fixed costs, substantial fixed costs, may be able to
15 operate on a much slimmer margin than one who
16 invested in a substantial amount of hardware, iron,
17 that he uses for the webcasting function.

18 So I think that business models likely
19 differ and therefore I would be loath to say what
20 the right margin ought to be.

21 JUDGE WISNIEWSKI: Dr. Ordover, let me
22 follow up with you on that just a bit.

1 THE WITNESS: Sure.

2 JUDGE WISNIEWSKI: Because you mentioned
3 this in your testimony at VI.B and again in 22. The
4 notion that higher fixed capital ought to generate a
5 higher rate of return. How generalizable is that
6 principle? For example, airlines since deregulation
7 have notoriously low rates of return even though their
8 capital requirements are huge.

9 THE WITNESS: Right. I think that
10 accounts -- maybe I created caused a bit of confusion
11 here with somewhat imprecise language. If so, I
12 apologize.

13 The higher the fixed costs of the
14 operation, the higher has to be a spread between the
15 revenues and the flow of variable costs. Okay? So
16 what I call the variable cost margin and what I
17 think Dr. Fratrik interprets as the 20 percent
18 spread.

19 If that spread is insufficient, then we
20 are going to have a situation like we frequently see
21 in the airline business, which is that the airlines
22 go bust with uncanny regularity.

1 On the other hand, it appears also that,
2 despite these failures, they are still able to keep
3 on investing. And that raises the question, you
4 know, what is the required rate of return on the
5 invested assets. And I would like to make a
6 distinction between the required rate of return on
7 the invested assets and the spread between the flow
8 of revenues and the outflow of costs, where the
9 costs outflow does not include depreciation and all
10 the rest.

11 So it is the ability to earn the spread
12 that enables the company to earn an adequate rate of
13 return. But those two are not one and the same.

14 I hope that helps.

15 JUDGE WISNIEWSKI: That does help.

16 THE WITNESS: Thank you.

17 JUDGE WISNIEWSKI: Speaking of the airlines,
18 one of the factors there, isn't it, that what's
19 important to focus on is not the actual rate of return
20 on capital but the cash flow that they generate
21 because of the amount of seats they sell and --

22 THE WITNESS: Yeah. Absolutely. Somebody

1 once said one way to become a millionaire in the
2 airline industry is to start with a billion dollars.

3 So, precisely. Because frequently the
4 spread between their outflow of costs and the inflow
5 of revenue is so narrow as to make it impossible to
6 recover the costs which they have in the metal,
7 which is the planes, not to mention the hubs and
8 those kinds of things. It's a huge fixed cost
9 operation. Not only fixed but also sunk, which
10 makes life easier, perhaps.

11 BY MR. HANDZO:

12 Q Dr. Ordovery, let me ask you to turn to
13 page 14 of your testimony, where you begin to talk
14 about the NAB rates. First of all, you recall that
15 Dr. Fratrik addresses the NAB rates?

16 A Yes, he does.

17 Q Do you recall that he concludes the NAB
18 rates are not useful as evidence here?

19 A He does, for three reasons that I have
20 listed first.

21 Q And do you have a conclusion about whether
22 the NAB rates are useful evidence in this case?

1 A Yeah. My overarching conclusion is that the
2 NAB rates do provide a valuable data point for the
3 judges' consideration in determining what the willing
4 buyer/willing seller rate would be for webcasting.

5 Q Now, one of the criticisms that Dr. Fratrik
6 has, I think you address here starting on page 14,
7 that is what he contends is a higher cost of
8 commercial webcasters.

9 Now, with respect to the webcasting
10 market, if you have a group of one buyers who can
11 pay a higher rate, another group of buyers who can
12 only afford a lower rate, would you necessarily
13 expect the sellers to price-discriminate between the
14 two?

15 A The critical, the operative word is
16 "necessarily." And my answer would be no. It depends
17 on these two economic concepts. One is demand
18 creation and the other one is demand cannibalization.

19 So if offering a lower rate to these
20 high cost -- let's call them high cost suppliers, or
21 suppliers who have maybe less desirable product,
22 simply transfers a huge chunk of sales from the

1 more -- the lower cost group to those with higher
2 cost, then this is not a net gain. It's likely to
3 be a net loss to the seller of the input. Here, the
4 licensing rights to the music.

5 On the other hand, if the low cost -- if
6 the high cost suppliers fill an important niche and
7 stimulate demand as opposed to cannibalizing it,
8 then there may be some incentive to sustain
9 cannibalization losses to some extent while
10 stimulating the overall supply.

11 So much depends on the degree of
12 stimulation and the degree of cannibalization.
13 Those are standard economic ideas that are reflected
14 in such concepts as cross-elasticity of demand and
15 elasticity of demand, which I understand were
16 discussed in this proceeding.

17 JUDGE ROBERTS: Dr. Ordover, I hear you
18 balancing those two considerations out in your
19 testimony today, but I'm looking at footnote 39 --

20 THE WITNESS: 39?

21 JUDGE ROBERTS: -- of your testimony on
22 page 15. And I'm looking at the last sentence, where

1 you say, "SoundExchange is unlikely to have any
2 incentive to offer lower rates to high cost webcasters
3 because the likely effect of such rates will be to
4 divert demand from webcasters who pay higher rates."

5 So you seem to be, in your written
6 testimony, favoring one of the two viewpoints that
7 you just enunciated.

8 THE WITNESS: I think -- right. Right. I
9 think that maybe again, if I can direct Your Honor to
10 the beginning of the sentence, which says, "absent
11 such meaningful product differentiation from the
12 entrant," the rest follows.

13 So I have no views on whether or not
14 there are entrants that would in fact warrant such
15 favorable treatment because they are opening up a
16 new pool of demand that otherwise might not be --
17 might not be available.

18 But if the main effect of a certain
19 category of suppliers is simply to divert the
20 business from one group of webcasters to -- that
21 pays a higher rate to that -- that otherwise would
22 pay a lower rate, then I am of the view that such

1 price differentiation does not make economic sense.

2 But I do agree that, if somebody can
3 open up a new pool of demand to stimulate demand,
4 then there might be an economic reason to offer a
5 discount rate to such a webcaster.

6 JUDGE ROBERTS: What I'm struggling with is
7 trying to understand how a royalty rate, whether it be
8 a high rate paid by one webcaster or a low rate paid
9 by another webcaster, how that would impact demand for
10 that service or for those two services.

11 In other words, if I understand what
12 you're saying here is the concern is is that, if
13 we -- if demand is driven toward the webcaster that
14 pays the lower royalty rate, then that's going to be
15 ultimately, of course, a net loss, because that is
16 cannibalized, as you said, from the webcaster that
17 pays the higher rate.

18 But in the marketplace, how would that
19 practically happen?

20 THE WITNESS: Okay. Well, I can think of
21 two or three mechanisms. Number one is, of course,
22 the -- to the extent that the webcaster has

1 subscription business and, therefore, charges the
2 subscribers a fee for listening to the programming,
3 then the higher costs to that program -- to that
4 webcaster driven by higher license fees will likely
5 translate themselves into higher subscription fees.
6 And, therefore, that will tend to divert the business
7 away from this particular webcaster to another
8 webcaster who charges a lower fee by virtue of having
9 a lower base of variable costs.

10 JUDGE ROBERTS: Okay. I can understand
11 that. But this business of noninteractive
12 webcasting --

13 THE WITNESS: Yeah.

14 JUDGE ROBERTS: -- very little subscription
15 based.

16 THE WITNESS: Right. So I was going to
17 continue by pointing out that in the world that we are
18 thinking about, there is a lot of free stuff. You get
19 to listen for free. Well, there's never free.

20 JUDGE ROBERTS: Okay.

21 THE WITNESS: And the question becomes what
22 happens if these rates for music go up in a free

1 context.

2 Well, several things can happen. One is
3 the webcaster may simply limit the amount of free.
4 In other words, you may have to be required to relog
5 or get off the service and then come back, which is
6 an inconvenience, because they cannot afford to pay
7 that much for music that is only generating
8 advertising revenue.

9 Similarly, they may constrain the amount
10 of these skips, I think they're called, whereby you
11 can listen to a segment of a song and decide that
12 you don't want to listen to it because you don't
13 like it. Well, there is a fee for that being paid
14 to SoundExchange and obviously to the record
15 companies.

16 So if you are trying to control the
17 demand by virtue of having a higher cost, you will
18 try -- you may be forced, not that you want to, you
19 may be forced to deteriorate quality. And the more
20 quality is deteriorated for a particular webcaster,
21 the more it is likely to divert itself to those who
22 are perfectly capable of affording higher quality

1 service.

2 So I would focus Your Honor on both the
3 price dimension and the quality dimension. There's
4 those that can be controlled to some extent by the
5 webcasting service.

6 JUDGE ROBERTS: Thank you.

7 BY MR. HANDZO:

8 Q Dr. Ordover, let me ask you to move ahead to
9 page 16 of your testimony. And there I think you
10 address Dr. Fratrik's suggestion that the threat of
11 litigation would have impacted the NAB rates.

12 A Yes.

13 Q Can you tell us what your opinion is on
14 that.

15 A Well, I -- my bottom line conclusion is that
16 we cannot -- I do not agree with Dr. Fratrik, which is
17 that the threat of litigation would somehow make NAB
18 willing to agree to rates which are the upper end or
19 they're elevated relative to what those rates would be
20 in the absence of such a threat. I believe that such
21 a threat works on both sides. And I do not agree with
22 Dr. Fratrik that the fact that each side has to

1 finance litigation differently somehow creates an
2 imbalance of incentives as between the NAB members and
3 the SoundExchange members.

4 Q Okay. Now, turning the page to page 17, you
5 discuss there the sound recording performance
6 complement waiver. Do you see that?

7 A Yes, sir.

8 Q And do you have an opinion about whether the
9 sound recording performance complement waiver had an
10 impact on the rates here?

11 A Yes, I do.

12 Q What is that?

13 A Dr. Fratrik, again, argues that the
14 performance complement waiver is highly valuable and,
15 as such, may have induced NAB members to pay a higher
16 rate relative to the world in which the complement
17 waivers were not in play, so to speak. One could not
18 modify one way or the other.

19 I don't agree with that conclusion, A,
20 because the rates that Sirius is paying, for
21 example, are not that different, and there's no
22 waiver in those rates.

1 Secondly, again, we have to look at the
2 economics of the situation, which is that the
3 granting of that waiver turned out to be quite
4 valuable in certain respects to the members of
5 SoundExchange because it did create some incentives
6 for new broadcasters to become -- for broadcasters
7 to become simulcasters. And I offer in my report
8 some estimate of that number, there's 100 new
9 simulcasters offering somewhere in the neighborhood
10 of 300 radio stations.

11 So there is a benefit because these
12 people now are paying the fees which they otherwise
13 might not.

14 Q And, lastly, Dr. Ordover, if you turn to
15 page 22 of your testimony, you have a heading there
16 that reads, "There is no basis to conclude that the
17 SoundExchange NAB rates are elevated as a result of an
18 exercise of market power by SoundExchange."

19 Can you tell us why you reach that
20 conclusion?

21 A This is a long and tricky section which also
22 is accompanied by an appendix. For those of Your

1 Honors who are mathematically minded, I tried to
2 actually prove that claim.

3 CHIEF JUDGE SLEDGE: We always rely on
4 Mr. Handzo for those computations.

5 MR. HANDZO: The record should reflect a
6 general chorus of laughter throughout the courtroom.

7 THE WITNESS: I was crying more than
8 laughing.

9 But, yes, the argument I'm trying to
10 develop here, which, again, is not unfamiliar to
11 those in the intellectual property areas, which is
12 what Your Honors' area of expertise indubitably is,
13 relies on the idea that a purchaser may require a
14 set of licenses in order to have a valuable product.

15 In the limiting case, the customer, the
16 licensee, may require separate licenses from a large
17 number of suppliers in order to have any product
18 whatsoever.

19 So in that particular setting, because
20 of the complement that these various licenses are,
21 here the repertoires of the various recording
22 companies, for NAB members -- and I'm only speaking

1 about NAB members as I indicate in the heading --
2 the need to have a broad range of licenses in order
3 to have a high quality competitive offering,
4 actually creates a situation that economists think
5 is prototypical of the world in which a single firm
6 negotiating on behalf of all these complimentary
7 licenses delivers a lower market rate in the
8 aggregate than if these licenses were negotiated
9 separately.

10 Again, this works, as I point out, when
11 there's a need for the broad range of these
12 complementary licenses. When there is no such need,
13 the argument does not survive, or survives in a much
14 weaker form. One can make it go but it's no longer
15 as clear as the one that I just described.

16 So we have an unusual circumstance of
17 complements. And we know that economics of
18 complements is quite different from the economics of
19 substitutes. And this is an example of that, a very
20 important one, because of its repeated appearance in
21 the intellectual property licensing area.

22 MR. HANDZO: May I have one moment, sir?

1 CHIEF JUDGE SLEDGE: Yes, sir.

2 MR. HANDZO: Thank you, Your Honor. That's
3 all I have.

4 CHIEF JUDGE SLEDGE: We'll take a 10-minute
5 recess.

6 (Whereupon, a recess was taken between
7 10:53 a.m. and 11:04 a.m.)

8 CHIEF JUDGE SLEDGE: We'll come to order.

9 Any cross-examination, Mr. MacDonald?

10 MR. MacDONALD: Yes, Your Honor.

11 CHIEF JUDGE SLEDGE: All right, sir.

12 CROSS-EXAMINATION

13 BY MR. MacDONALD:

14 Q Good morning, Dr. Ordover.

15 A Good morning.

16 Q You previously served as an expert economist
17 for SoundExchange in the SDARS proceeding, correct?

18 A Yes.

19 Q And over the past 10 years, you've
20 previously been retained by one or more of the record
21 labels as a testifying expert or consultant about five
22 or six times; is that correct?

1 A Yes.

2 Q Over the past 10 years you've provided
3 testimony, either in the form of deposition, trial or
4 other proceedings, at least 40 times; is that
5 approximately correct?

6 A I think that's on the high side. But it
7 could be that much, yes.

8 Q And you've never provided testimony on
9 behalf of a webcasting service in any of those prior
10 engagements, correct?

11 A No, no. No webcasting service tried to
12 engage me.

13 Q And you're not a webcasting expert, are you?

14 A I don't know what you mean by it. I'm able
15 to enjoy webcasting by logging on to the radio
16 stations, webcasting stations. But before I can
17 answer your question, I would like to know your
18 definition of an expert in webcasting.

19 CHIEF JUDGE SLEDGE: That's a bit alarming,
20 Dr. Ordoover, you being qualified as an expert, and you
21 feel uncomfortable knowing what an expert is.

22 THE WITNESS: I don't qualify myself. But,

1 Your Honor, I -- I don't know what it means to be an
2 expert in webcasting. I know what it means to be an
3 expert in economics or industrial organization
4 economics, which I think is what I was qualified as.

5 CHIEF JUDGE SLEDGE: I think the obvious
6 response I'll leave to counsel.

7 BY MR. MacDONALD:

8 Q Well, let me actually explore whether you
9 have this expertise or whether you may not. Prior to
10 this matter had you ever studied financial documents
11 such as profit and loss statements of any webcasters?

12 A No. But I've studied numerous profit and
13 loss statements across a broad range of industries in
14 the United States and worldwide.

15 Q But not of webcasters?

16 A No. But I do believe that their financial
17 statements have to satisfy the general, the principles
18 of accounting and financial statements, and,
19 therefore, I can testify with -- clearly that, when
20 confronted with a financial statement, a P&L
21 statement, I can read it and decipher it even though
22 it may be in an industry that I have never looked at

1 before.

2 Q Well, prior to your receipt of Dr. Fratrik's
3 report, had you ever performed a financial or economic
4 analysis about the webcasting industry?

5 A No.

6 Q You've never run a webcasting service,
7 correct?

8 A That is true. I have never run such a
9 service.

10 Q You've never been employed by a webcasting
11 service?

12 A No, I have never been employed by a
13 webcasting service.

14 Q In your numerous previous testifying
15 engagements, none of them involved the webcasting
16 industry, correct?

17 A That is true. But if you turn to my -- if
18 you have my CV in front of you, and the cases in which
19 I testified, they range from such things as
20 microprocessors all the way down to supermarkets in
21 southern New Jersey. And I can assure you that I have
22 never run any one of these businesses or been employed

1 by any one of those businesses. Nevertheless I
2 offered testimony which was found to be helpful to the
3 courts on many cases, in many instances.

4 Q Well, I did go through that list. And I saw
5 none of them that involved the webcasting industry.
6 Is that correct?

7 A That is true.

8 Q In fact, you don't listen to much music;
9 isn't that correct?

10 A I listen to some music. Not as much as I
11 used to in my youth. But I do listen to music, mostly
12 to CDs, actually.

13 Q And, therefore, not through a streaming
14 service, correct?

15 A I have listened to both. And my wife and my
16 stepchildren are avid, avid consumers of all forms of
17 music, including streaming. So I am exposed to that
18 experience because of my wife's listening and because
19 of my stepchildren hanging around the house and
20 enjoying the music 24 hours a day.

21 Q Well, in all your years of teaching at NYU,
22 have you ever taught a course on the webcasting

1 industry?

2 A No, I have not. The webcasting industry is
3 a component of a broader range of industries about
4 which I lecture and about which I have done a fair
5 amount of research in various matters, which is,
6 whether you call it entertainment industry or content
7 industry, those I am very familiar with.

8 Q All right. But you haven't published any
9 articles about webcasting, right?

10 A That is true.

11 Q In your teaching you don't have a webcasting
12 module as part of any of the courses that you teach,
13 right?

14 A No. In my B.A. course, I have only
15 26 hours. If I tried to have a module for every
16 industry, I would never get beyond step one.

17 Q And you're not involved in the selling of
18 advertising in the webcasting industry, correct?

19 A No.

20 Q You don't know what CPM rates for webcasting
21 services are getting currently, right?

22 A That is true, I have no idea what they are.

1 Q And you don't have knowledge as to the
2 approximate percentage of subscription versus
3 nonsubscription performances streamed in the statutory
4 webcasting industry, correct?

5 A No, I don't.

6 Q At the time of your engagement, you did not
7 understand the marketplace from a deep economics that
8 one would like to have, correct?

9 A I -- prior to my engagement, I understood
10 webcasting purely -- in two ways. One, as someone who
11 listens, occasionally, especially in my NYU office,
12 because that's where I have my computer, I can listen
13 to music there. And, also, from my long-standing,
14 deep-seated interest in content and its distribution.

15 Number 3, I have had numerous
16 conversations with my stepson, who actually spends a
17 good deal of time in that realm, for a variety of
18 reasons which, you know, totally irrelevant to this
19 proceeding. But I would be happy to discuss them if
20 you wish.

21 Q Well, at the time of your engagement, it was
22 Mr. Handzo who was largely responsible for bringing

1 you up to speed on the marketplace, correct?

2 A Mr. Handzo gave me a short introduction.
3 Much of the stuff I already knew from my own
4 experience. I certainly did not have the detailed
5 knowledge of distinguishing Live365 from when I listen
6 to WNEW stream on my computer. But now I have that
7 understanding.

8 Q Well, do you have an understanding that you
9 were qualified as an expert in webcasting for this
10 proceeding?

11 A Well, I think -- well, it's not up to me to
12 say what I was qualified as or in or what. I am
13 qualified, as my understanding, as an expert in
14 industrial organization economics, and I am trying to
15 bring my expertise, which goes back, I don't know,
16 30 years or more, to the issues raised by this
17 particular proceeding.

18 And it's my view that my training as an
19 economist makes me eminently qualified to react or
20 respond to the issues raised by Dr. Fratrick. And my
21 understanding is that he also has never run a
22 webcasting business or sold advertising, although --

1 Q Is it your understanding that Dr. Fratrik
2 was qualified as an expert in the webcasting industry
3 for this proceeding?

4 A Look, let's put an end to that. I'm not
5 going to quarrel with you as to what it is I have been
6 qualified in or not. That's a legal question. It has
7 nothing to do with who I am. I am sitting here
8 answering your questions as you put them to me, and
9 Your Honors' questions that are put to me, based on my
10 some 30-odd years of practicing industrial
11 organization economics in a variety of ways, including
12 being the deputy assistant general for economics in
13 the United States Department of Justice.

14 Q You never reviewed the Webcasting II
15 determination that the judges issued here?

16 A I beg your pardon?

17 Q You never reviewed the Webcasting II
18 determination that the judges issued?

19 A I have reviewed it since -- I have seen it.
20 I have looked at it before my deposition very briefly,
21 if I recall. But since then, I have spent a few hours
22 studying the full decision, yes.

1 Q After the deposition?

2 A Yes.

3 Q You don't recall ever reviewing any of the
4 written statements or briefings in the Webcasting II
5 determination prior to your deposition, correct?

6 A That is true.

7 Q You didn't speak with any webcasting
8 companies to learn about the statutory webcasting
9 industry, correct?

10 A I have not talked to any webcasters. But I
11 have acquired sufficient information from third-party
12 sources. I didn't think that it was terribly
13 necessary for the purposes that I am here to testify
14 to speak to someone from some webcasting firm or
15 business.

16 Q You had a few people help you in the
17 preparation of your report for this proceeding,
18 correct?

19 A Yes. As I always have, yes.

20 Q There's a gentleman named Doug Fontaine,
21 correct?

22 A Yes.

1 Q Another gentleman named Mr. Eilat?

2 A Yes.

3 Q Mr. Fontaine and you set out to produce the
4 report, correct?

5 A I am the author of the report. And as every
6 time I prepare a report, I have a backup team that
7 works with me to produce a report. And that report
8 you have and the judges have.

9 Q Now, Dr. Ordoover, you gave the Court a
10 number of different criticisms of Dr. Fratrik during
11 your direct examination. But you didn't think -- you
12 didn't spend one minute thinking about how you would
13 have devised a rate from the ground up differently
14 than Dr. Fratrik did, correct?

15 A You said from the ground up; is that the
16 approach you're asking me to comment on?

17 Q Yes.

18 A It was not my assignment to calculate the
19 rate, and, therefore, I spent no time to calculate it
20 either from ground up or from top down, by looking at
21 some other rate and working down from that rate to the
22 appropriate rate.

1 Q You didn't think about how you would do it
2 differently, right?

3 A That is true. That was not my assignment,
4 to think about how I would do it differently.

5 Q In doing an economic model one has to
6 reflect the realities of the marketplace in which the
7 modeling takes place, correct?

8 A You are quoting a lovely sentence from my
9 report.

10 Q That's true, right?

11 A Yes.

12 Q Now, in creating his model, Dr. Fratrick only
13 uses some data from Live365 to develop his rate,
14 correct?

15 A Yes. He uses the cost data. But he uses
16 revenue data for advertising from Live and two other
17 sources.

18 Q What are those other two sources?

19 A I have to go and look it up for their names,
20 but they are two publicly available sources, each of
21 which provides different numbers for the amount of
22 advertising that is earned by the webcasting industry.

1 Q Now, turning --

2 A One of them is Genius Media, but I don't
3 recall the other one.

4 Q Turning to paragraph 6.A on page 3 of your
5 report, Dr. Ordoover.

6 A Just give me one second, please. 6.A.
7 Okay.

8 Q This is on page 3.

9 A Got it.

10 Q First sentence, "First, Dr. Fratrik's
11 framework is premised on his assertion that Live365 is
12 a representative or typical webcaster."

13 Do you see what I just read?

14 A Yes, I see that.

15 Q Throughout your testimony that I heard today
16 you criticized Dr. Fratrik for assuming Live365 is
17 typical, correct?

18 A Right.

19 Q Dr. Fratrik doesn't actually state in his
20 report that the business model of Live365 is typical,
21 does he?

22 A Well, in fact, footnote 3, which references

1 the hearing transcript, and we may have to take a look
2 at it since I cannot recall it by heart, seems to
3 suggest that Dr. Fratrik's framework is in fact
4 premised on this assertion. And let me then go on and
5 say that if that is not the assertion, that Live365 is
6 a one-off operation, then I am hard-pressed to think
7 about the relevance of the rate that he calculates
8 using Live365 for the rest of the industry. Either it
9 is representative or it's not. If it's not, one thing
10 follows. And if it is, then I am questioning that
11 claim.

12 Q Well, with respect to his written report,
13 the only time Dr. Fratrik ever made a claim that
14 Live365 is typical or representative was with respect
15 to the operating costs of Live365, correct?

16 A Again, I don't recall. But to say that's
17 the only time points out to the complete failure of
18 his approach. Because when it comes to the operating
19 costs, the fact that his business is structured quite
20 differently from many others is -- makes it quite
21 unlikely that its so-called operating costs, as he
22 measures them, are indicative of what the operating

1 costs would be for other webcasters.

2 Q Dr. Fratrik doesn't make a statement of
3 Live365's typicality with respect to its revenues?
4 This, by the way, is just a yes or no question.

5 A Again, I just -- as I sit here, I don't
6 recall. He says what he says.

7 Q Now, further down in that paragraph, 6.A,
8 the last sentence, you state, "There is no reason to
9 think that Live365's operating costs and subscription
10 revenues, as well as the percentage breakdown in
11 Live365's revenues between advertising and
12 subscription can serve as reasonable proxies for
13 webcasters more generally."

14 Do you see what I was just reading?

15 A Yep.

16 Q Are you aware that Dr. Fratrik provided
17 other sources of data, namely from SoundExchange and
18 Dr. Pelcovits, that confirms the numbers that he used
19 in his model?

20 A My reading of what he did is that he had to
21 rely on three sources of advertising revenues in order
22 to calculate -- to get to the point that the rate that

1 he calculates is, in fact, high enough to -- no, low
2 enough, to generate a 20 percent operating cost
3 margin.

4 So the fact that he provides these kinds
5 of different sources of data in his calculations I
6 believe to a large extent -- to some extent, I don't
7 want to say to 100 percent, but it's in some way
8 driven by the need to come up with a calculation
9 that's economically meaningful, that he thinks is
10 economically meaningful. I don't believe it to be
11 so.

12 Q Back to my question, Dr. Ordovery. Are you
13 aware whether Dr. Fratrick provides sources of data,
14 namely from Dr. Pelcovits and SoundExchange, that
15 confirms the numbers that he's using in his model?

16 A Again --

17 Q It's a yes or no, Dr. Ordovery.

18 A I don't recall precisely. I know the data
19 that he uses to calculate the proposed rates. And I
20 have serious doubts about these calculations. I'm not
21 questioning the data. I'm questioning the
22 calculations. That's the disconnect, though, perhaps

1 we are having right now.

2 Q You didn't read Dr. Pelcovits' analysis in
3 this proceeding in any detail, correct?

4 A No, I have not.

5 Q With respect to Live365's operating costs,
6 you don't know if the cost numbers provided by
7 Dr. Fratrick is atypical of the industry, do you?

8 A Well, I think the main problem, as I already
9 testified, with his analysis of Live's operating costs
10 is that these are arbitrarily divided as between the
11 two sides of Live's business.

12 Furthermore, the fact -- that fact alone
13 makes them suspicious. And second point being that
14 Live's business model is quite different from that
15 of several or many other webcasters creates serious
16 doubt in my mind about their typicality.

17 And, number 3, I have no idea what does
18 one mean by typical, given that the only thing that
19 we have is the snippets of data that are sprinkled
20 in his report.

21 Q You have no basis to conclude that Live365's
22 operating costs as provided by Dr. Fratrick is atypical

1 of the industry, right?

2 A I have basis to conclude that what he calls
3 in his report an operating cost is not an economic
4 measure of cost. It is an arbitrarily divided --
5 excuse me -- arbitrarily divided total operating cost
6 for Live, which, based on what Live's executives told
7 him the allocation ought to be.

8 Q Now, with respect to Live and its separate
9 business lines, you are aware, aren't you, that
10 Live365 maintains the separate business lines separate
11 and apart from this proceeding? You're aware of that,
12 aren't you?

13 A Yes. But to me as an economist, that means
14 nothing. It simply suggests that that might be a
15 convenient way for them to keep their accounts. I am
16 not looking at this as an accountant. I'm looking at
17 Live from the standpoint of economics.

18 Q You're not -- I'm sorry.

19 A I'm finished.

20 Q You're not suggesting that Live, for this
21 proceeding, created the separate lines of businesses?
22 You're not making that suggestion, right?

1 A Absolutely not. I'm not implying that at
2 all. I'm simply implying that the way they divided
3 their business is for their own purposes, which I
4 don't question. But I do believe that that division
5 of accounts is meaningless for the purposes that
6 Dr. Fratrik set out to use them, which is to calculate
7 the rate in this proceeding.

8 Q But, in order to calculate the rate, he
9 looks at certain data, and he comes up with certain
10 calculations, including operating costs, subscription
11 revenues, and the third thing that -- the percentage
12 breakdown between revenues and -- between -- revenues
13 between advertising and subscription, right?

14 A Yes, he does. But I hate to say it, but, if
15 you put the wrong data in, you're going to get a wrong
16 outcome even though the translation between the data
17 and the outcome is flawless as a matter of algebra,
18 okay. So I'm questioning the inputs. I'm not
19 questioning the fact that he did not do those
20 divisions right.

21 He has wrong inputs, therefore he cannot
22 get the right output by definition.

1 Q Well, with respect to the subscription
2 revenue input and the number put forth by Dr. Fratrik,
3 you don't have a basis to claim that that number, the
4 subscription revenue number he uses in his model --

5 A Right.

6 Q -- is atypical of the industry, do you?

7 A Would you mind asking the question again.

8 Q You don't have a basis to conclude that the
9 subscription revenue number that Dr. Fratrik relies
10 upon in his model is atypical of the industry?

11 A Well, I do actually seem to have a good
12 reason to think that it may be problematic, because as
13 I said a minute ago, a moment ago, Dr. Fratrik relies
14 on both Live's own subscription and -- he relied on
15 subscription numbers from Live. But I don't know
16 whether those subscription numbers for Live are at all
17 indicative of subscription breakdown for any and all
18 other advertisers. Some have -- any other webcasters.
19 I just don't know that. I don't believe we can tell
20 that based on the evidence that he puts forth. I have
21 no reason to believe that this is a representative
22 number.

1 Q And you don't have a counterproposal, do
2 you?

3 A I'm not here to put in counterproposals.
4 I'm here to offer a critique. Either my critique is
5 valid or it's not valid. But I'm not here to say that
6 those numbers are different.

7 All I know is I -- there are webcasters
8 who do not have any advertising revenue. And there
9 may be webcasters who have no subscription revenue,
10 only advertising revenue. For example,
11 simulcasters, right, they do not charge anything for
12 listening to the music on the simulcast.

13 Q On the last of the three data inputs that
14 you point out at the bottom of paragraph 6.A, which is
15 the percentage breakdown between advertising,
16 subscription, listening, you don't know if that ratio
17 that Dr. Fratrick comes up with is atypical for the
18 industry, do you?

19 A Let me comment on that advertising issue
20 because I believe that Dr. Fratrick does, indeed,
21 reveal that this number is subject to huge problems.
22 He offers three sources of advertising revenue per

1 play, or streaming -- or per ATH or whatever number he
2 calculates.

3 And each one of these three sources, one
4 being Live's own experience, and then the two other
5 from public sources, each of which gives a different
6 number. So we have three numbers. And Dr. Fratrik
7 picks one of them. Why? I cannot say for sure why.
8 But I do see that, for the two that he puts forth,
9 SoundExchange would be required to pay Live money
10 for playing music in order for Live to obtain the
11 20 percent variable cost margin which he says is a
12 target rate.

13 And, therefore, I have all the reasons
14 to doubt that any one of these numbers is indicative
15 of the industry or even meaningful.

16 Q On the one that you just pointed out where
17 the record labels have to pay Live365, Dr. Fratrik
18 doesn't use that model for his rate proposal, does he?

19 A No. But I'm not saying that he does. What
20 I'm saying is that, when one uses different private
21 and public sources of revenue, it turns out that the
22 rate is quite different, because he needs, in his

1 model, the one thing -- there's a fixed input in his
2 model is the required or the target rate, the markup
3 of the revenues over variable or operating costs.
4 That's supposed to be 20 percent.

5 How do you get to that 20 percent? The
6 only way you can get to that 20 percent, if one
7 picks one of the advertising numbers per ATH,
8 because, otherwise, the 20 percent target rate could
9 only be met if SoundExchange actually pays Live to
10 webcast the music of its members. And to me, that
11 makes no economic sense whatsoever.

12 Q Well, Dr. Ordovery, do you have knowledge as
13 to which industry estimates are in fact the most
14 appropriate or the most reliable to use for this
15 industry?

16 A I -- I am not making judgments on that
17 subject. All I know is that we have different
18 assessments. And Dr. Fratrik uses one, whether it's
19 the best one or not. I don't recall him saying this
20 is the one -- I mean, all the other ones are nonsense,
21 this is the only one that makes economic sense, the
22 best data point that I can come up with.

1 He has three, two of which leads to
2 negative rate under his methodology.

3 Q But the one that he uses, which is the
4 highest for the industry, actually favors
5 SoundExchange in the form of a higher proposed royalty
6 rate, correct?

7 A Well, favors it relative to the ridiculous
8 outcomes he gets by using the two other ones. And if
9 the two other ones are better indicators, then the
10 fact that he's favoring SoundExchange is purely
11 happenstance.

12 Q He didn't use the two others, did he?

13 A That's not the point. I think we are
14 quarreling for no good reason. I think we all
15 recognize he use one number which gives a positive
16 rate, whereas two other advertising revenue numbers
17 give negative rates.

18 And the reason for that is the
19 predetermined minimum, 20 percent margin that he has
20 to generate based on another flawed assumption.

21 If he did not have that number, he could
22 have perfectly well used Live's numbers in order to

1 figure out what the rate in this proceeding ought to
2 be.

3 Q Well, let's --

4 A Something has to give.

5 Q Let's talk about the operating margins then.
6 for a few moments.

7 This proposed operating margin of
8 20 percent is based upon Dr. Fratrik's conclusion
9 that companies in a comparable industry, like the
10 terrestrial radio industry, earn operating margins
11 on average slightly above 20 percent, correct?

12 A Yes.

13 Q There is nothing inherently inappropriate
14 with using comparables to come up with a recommended
15 operating margin, is there?

16 A No. The operative word is "comparable."
17 And I don't believe that Dr. Fratrik convinced me at
18 least that the terrestrial radio is, indeed, the right
19 comparable.

20 Q Which one's the right comparable?

21 A I am not putting forth the right comparable.
22 I am simply saying that his comparable, based on what

1 I have read in his report, is not convincing to me to
2 be the correct one, for a variety of reasons that I'm
3 happy to address.

4 Q In fact, you truly don't know what type of
5 industries are good examples for comparables for the
6 statutory webcasting industry, correct?

7 A I have not spent time investigating that
8 issue. I am here to comment on Dr. Fratrick. And you,
9 yourself, quite correctly or incorrectly, criticized
10 me perhaps for overstepping.

11 Now you're telling me to go to a place
12 that Dr. Fratrick did not go and start offering my
13 own rates and my own estimates. I'm not doing that.
14 I have a very small ambit here.

15 Q You agree, don't you, that looking at the
16 long term, the royalties need to be set at a rate that
17 allows webcasters as an industry to earn enough of a
18 return to sustain themselves in the marketplace,
19 correct?

20 A Some webcasters, not all. There is no
21 guarantee.

22 CHIEF JUDGE SLEDGE: Would you say that

1 question again.

2 MR. MacDONALD: Sure, Your Honor.

3 BY MR. MacDONALD:

4 Q You agree, Dr. Ordover, don't you, that
5 looking at the long term, the royalty needs to be set
6 at a rate that allows webcasters, as an industry,
7 generally speaking, to earn enough of a return to
8 sustain themselves in the marketplace?

9 CHIEF JUDGE SLEDGE: That's asking a legal
10 question, which is a very flawed legal question, to an
11 economic expert.

12 Can you answer that question?

13 THE WITNESS: I will try, Your Honor. From
14 an economic standpoint as opposed to the legal
15 standpoint, the rate that will be set is going to
16 sustain on the forward-looking basis some webcasters.

17 Economic answers does not mean that
18 every webcaster, however desirable or undesirable
19 his product is, or efficient or inefficient his
20 business or her business model is, will survive
21 under whatever rate Your Honors decide to set.

22 We do know that there are webcasters out

1 there who are able and willing to pay the rate and
2 surviving in the industry. All the simulcasters are
3 there. Sirius is there. Pandora is there. And
4 they are paying rates, whatever rates they are
5 paying that make them viable companies, at least at
6 this point.

7 BY MR. MacDONALD:

8 Q Echoing Judge Roberts' question from
9 earlier, you can't offer any guidance as to what an
10 appropriate operating margin should be for the rates
11 that are being set in this proceeding, correct?

12 A Again, I was not asked to provide such
13 guidance. My only assignment was to point out that
14 whatever it is that Dr. Fratrik did is flawed as a
15 matter of economics.

16 Q I'm going to quickly turn to the synergy
17 discussion that you had this morning.

18 A Yes.

19 Q And you state -- I think you stated that the
20 broadcasters -- sorry, Live365's webcasters won't sign
21 up without listeners. Is that a fair characterization
22 of your testimony?

1 A Right.

2 Q Are you aware that Live365 provides services
3 to its webcasters, at least some webcasters, who
4 stream from their own web sites?

5 A I am aware that they -- like CBS radio, I
6 think they program -- I don't know about the details
7 of that business. If -- if they provide programming
8 services or other services for those who stream from
9 web site like Yahoo Music, for example, that is
10 another business that requires listeners on the other
11 side. Yahoo Music requires listeners, otherwise they
12 will not stream. If they cannot get any audience for
13 their streams, they will not be willing to pay
14 anything to anyone for that privilege of streaming the
15 music.

16 Q But are you aware that some webcasters of
17 Live365, customers of Live365, don't need Live365's
18 listeners as part of its listening base?

19 A If those webcasters have independent
20 listening audience, then they don't. But my
21 understanding is also that there are hundreds and
22 hundreds of others, thousands, actually, who do

1 require, because they stream through the Live's
2 webcasting IT services.

3 Q And -- but you're not aware that there are
4 actually hundreds of webcasters of Live365 -- who come
5 to Live365 but who don't leverage Live365's listeners,
6 right?

7 A If that's the case, that's fine. That's
8 entirely consistent with my economic analysis.
9 Because for those people the two-sided platform is
10 somewhat different than the one I described earlier.
11 It does not at all undermine or undercut or vitiate my
12 point. My point is that for thousands of radio
13 stations, Live365 is a synergistic platform.

14 Q Is it a two-sided or three-sided platform?

15 A From my perspective, it's a three-sided
16 platform because it does involve sale of advertising,
17 and connecting listeners to the radio stations, the
18 radio stations to the listeners, and also
19 intermediating the advertising which is being streamed
20 as well to the listeners' computers.

21 So it's three sides.

22 Q Now, the operating margin, going back to the

1 20 percent operating margin.

2 A Yeah.

3 Q That's not -- that's not a Live365 operating
4 margin or what Live365 is trying to start. That's --
5 what Dr. Fratrik is providing with a 20 percent margin
6 is an industry recommendation for an operating margin,
7 correct?

8 A Oh, I think you're completely wrong. It's
9 not the industry recommendation. It is what
10 Dr. Fratrik thinks the industry is -- but the rate
11 that the judges are supposed to build up from his
12 other data point must have baked into it a 20 percent
13 margin. I don't believe that's an industry
14 recommendation. I -- I read it as Dr. Fratrik's
15 assumption based on what he sees as -- or he
16 interprets to be the margin for the terrestrial
17 broadcasting industry.

18 Q Right. But the 20 percent margin that he
19 arrives at is not just specific to Live365, right?

20 A The 20 percent margin, if it were baked into
21 the rate, would generate different margins for
22 different webcasters. Okay? Because different

1 webcasters have different revenue and cost flows. He
2 takes the number of 20 percent as an input. He asks
3 the judges or he does that to say here is the rate
4 that's consistent with that 20 percent margin. But he
5 never goes back and asks whether or not the same
6 20 percent margin would be generated by other
7 webcasters that would then end up paying that rate.
8 Okay?

9 So that we don't know. That margin may
10 be quite different. Some may be 30 percent. For
11 others it may be 3 percent. For others it may be
12 negative. I don't know.

13 Q But you do know with certainty that
14 Dr. Fratrik is wrong about his 20 percent operating
15 margin, correct?

16 A I disagree with his use of a 20 percent
17 margin to bake into the rates based on the source of
18 that margin, which is not other webcasters, is the
19 terrestrial radios that he claims are, on average,
20 earning 20 percent. It is an average. Some are
21 earning less. Some are earning more. He picks
22 20 percent as an average and then translates that into

1 the license rate, fee.

2 Q You haven't looked in any detail at the
3 economics of individual webcasters, have you?

4 A You mean whether they earn 20 percent margin
5 or do not? I don't know what you're asking.

6 Q I'm talking more generally. You have not
7 looked at the economics of webcasters, right?

8 A Well, I -- I sufficiently understanding of
9 what those economics are in order to offer the kind of
10 commentary that I've offered so far and in my written
11 report.

12 Q Let's turn to the NAB discussion. And you
13 believe that the NAB deal is informative to the Court,
14 correct?

15 A We are now at paragraph 43 just in case you
16 direct me --

17 Q I generally -- I'm more asking general
18 questions about section IV.

19 A I am -- yes. I am of the view that NAB rate
20 is an informative piece of data, is informative input
21 that the judges, if I may speak that way, ought to
22 consider in coming to the determination of what the

1 rate ought to be.

2 Q And is it your opinion that the NAB
3 agreement is informative because it was negotiated
4 with SoundExchange on one hand, a willing seller, and
5 NAB on the other hand as a willing buyer? Is that
6 essentially a fair characterization of your opinion
7 about the NAB deal?

8 A Well, I think it's a little bit broader than
9 that. But, as a starting point, yes, it was
10 negotiated by these two parties that have a good deal
11 of knowledge and expertise in the industry and
12 skilled, likely skilled in the aspects of negotiations
13 for the rates.

14 Q You're familiar with the standard governing
15 this proceeding, the willing buyer/willing seller
16 standard, correct?

17 A Yes.

18 Q Do you have some understanding as to whether
19 SoundExchange is a willing seller as defined by this
20 Court for this proceeding?

21 A My understanding is that SoundExchange would
22 be seen as a willing seller in this proceeding.

1 Q So you're not aware that this Court has
2 defined a willing seller as an individual record
3 company, are you?

4 A I am aware of that. For example, for
5 interactive rates, the willing seller would be an
6 individual record company. The -- here I am
7 understanding that SoundExchange has the rights,
8 statutory rights to negotiate on behalf of the record
9 companies. And the question that we have -- that I
10 have addressed is whether or not that fact by itself
11 undermines the finding that the NAB rate is not of the
12 sort that would be in line with what a willing buyer
13 and willing seller would negotiate.

14 Q Are you aware that even SoundExchange has
15 represented to this Court in the previous webcasting
16 proceeding that it is not a willing seller under the
17 willing buyer/willing seller standard?

18 You're not aware of that, are you?

19 A I take your representation to be correct.
20 But, again, from my perspective, the question is
21 whether or not the NAB rate, which was negotiated by
22 SoundExchange, and that's a legal issue, is in some

1 way out of line with what the standard required, which
2 is having the willing buyer and willing seller.

3 And the whole point, the critique of
4 Dr. Fratrick of the NAB rate, which does not go to
5 the issue of the willing buyer/willing seller -- he
6 makes three points, none of which question
7 SoundExchange as being the seller's side of that
8 transaction -- simply ignore the fact that
9 SoundExchange was the party negotiating the rates.
10 So he never objects to that. He objects to the NAB
11 rate on other grounds. I show those other grounds
12 are flawed.

13 I also point out in the last part of my
14 report why SoundExchange, representing all of the
15 record companies, could not be claimed to
16 necessarily have negotiated a rate that exceeds what
17 would arise in the environment with individual
18 record companies as being the willing seller.

19 Q But on the willing seller in terms of the --
20 as used by this Court --

21 A Right.

22 Q -- you don't have an understanding -- or do

1 you -- that SoundExchange constitutes a willing seller
2 under the standard?

3 A Under the standard, the record companies are
4 understood to be the willing sellers. What I am
5 trying to point out is that my analysis in the last
6 section of the report shows that SoundExchange
7 representing these willing sellers would not bargain
8 to a rate that exceeds what these willing sellers
9 would negotiate on their own.

10 Q Are you aware that a willing buyer is
11 defined as a DMCA compliant service?

12 A I am aware by reading the Webcasting II.

13 Q And you're aware that some simulcasters are
14 not DMCA compliant?

15 A I mean, you're asking me technical questions
16 about which I cannot opine.

17 Q Is that a technical question?

18 A Well, it's a legal issue of whether those --
19 whether those buyers qualify as willing buyer. There
20 is an economic definition of the willing buyer, which
21 is someone who willingly enters into a bargain with
22 another side, as opposed to being compelled. So, from

1 the economic perspective, they either -- they would
2 qualify. Whether they qualify from a legal
3 perspective for some reasons that you may tell me
4 about, I am not asked -- I'm not questioning that.

5 Q But you're aware that the NAB, of course,
6 sought a waiver of the performance complement
7 requirement, right?

8 A I am -- that I am fully aware of. And I
9 disagree with Dr. Fratrick that that seeking of the
10 waiver somehow --

11 Q It's just a yes or no question.

12 A Yes, I am aware of that, yes.

13 Q Okay. And obtaining the performance
14 complement waiver had value to the NAB, correct?

15 A My --

16 Q Yes or no?

17 A Yes. To some.

18 Q If a willing buyer is defined as a DMCA
19 compliant webcasting service, and the NAB entities as
20 a whole are not DMCA compliant without the waivers,
21 you would agree that the NAB is actually not a willing
22 buyer as defined in this proceeding, correct?

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1 CHIEF JUDGE SLEDGE: Mr. Handzo.

2 MR. HANDZO: Now, I think he's asking for a
3 legal conclusion as to who is DMCA compliant and what
4 the effect of that is.

5 CHIEF JUDGE SLEDGE: I'm going to overrule
6 in light of his testimony.

7 THE WITNESS: Could you repeat that question
8 for me. I lost it. Sorry.

9 BY MR. MacDONALD:

10 Q I think we've established, based on your
11 reading of the Webcasting II determination, recent
12 reading, that a willing buyer is defined as a DMCA
13 compliant service, correct?

14 A True.

15 Q And the NAB entities as a whole are not DMCA
16 compliant without the performance complement waivers,
17 correct?

18 A You're telling me that. I have no way to
19 say yes or no. You are testifying. You are asking me
20 a question about the legal aspects of the willing
21 buyer/willing seller standard. And I can only tell
22 you that, if you are correct, you are correct. If you

1 are wrong, you are wrong.

2 Q Why else would the NAB entities seek a
3 waiver of the performance complement?

4 A Oh, I can, I can explain the economics of
5 it. The -- there are certain restrictions on how much
6 of a particular song, record or a songwriter or
7 musician can be played within any given period of
8 time. Okay? And, therefore, if that programming were
9 streamed, it could run into the problem of the
10 restrictions.

11 So in order to enable streaming without
12 inducing or necessitating the revision or rewriting
13 or redesigning of the programming, the waiver would
14 be valuable.

15 So the purpose of the waiver is to avoid
16 unnecessary transactional costs and reprogramming
17 costs, which may be substantial for some or it may
18 be trivial for others.

19 Q Have you assessed on average that value to
20 the NAB of the performance complement waiver?

21 A Have I measured it? No. I -- I know that
22 Sirius, which also streams its programming, does not

1 have the waiver, particularly because it is already
2 complying with the rules. It's quite clear that some
3 radio stations may not be complying with those rules
4 in their terrestrial programming; and, therefore, they
5 would be seeking a waiver in order to be able to
6 stream.

7 Q You're aware that Sirius/XM is primarily, if
8 not exclusively, a subscription only service, right?

9 A Yes.

10 Q Okay. Back to the question that I asked a
11 minute ago. Let's assume that the NAB entities are
12 not DMCA compliant without the waivers. You would
13 agree that the NAB is not a willing buyer as defined
14 in this proceeding, correct?

15 MR. HANDZO: Again, I object. I think we're
16 now back to a legal question.

17 MR. MacDONALD: Your Honor, it's the exact
18 same question I asked.

19 CHIEF JUDGE SLEDGE: Why are you asking it
20 again?

21 MR. MacDONALD: Because I didn't receive a
22 response.

1 CHIEF JUDGE SLEDGE: All right. Go ahead.

2 THE WITNESS: I don't know --

3 BY MR. MacDONALD:

4 Q Simple yes or no.

5 A I cannot tell you because I don't know what
6 it means from the economics perspective. From the
7 economics perspective, NAB negotiated for the rate.
8 As a part of that negotiation, they asked for the
9 waiver.

10 Q How do you know that?

11 A What?

12 Q How do you know that? Did you speak to
13 anybody at NAB?

14 A This is what my understanding is. If my
15 understanding is wrong, fine.

16 Q Have you spoken to anybody at the NAB?

17 A No. I spoke with somebody at SoundExchange.

18 Q Who was that person?

19 A Mr. -- I don't recall. It's one of the
20 employees of SoundExchange. Somebody from the legal
21 counsel office.

22 Q Was this while you were preparing your

1 report or was this after your report was already
2 prepared?

3 A No. It's prior to my report having been
4 completed.

5 Q Did you speak to anyone from SoundExchange
6 about how they derived the rates in the NAB agreement?

7 A I did not ask that question, no.

8 Q And SoundExchange is of course your client
9 for this proceeding, correct? You could have just
10 asked SoundExchange how -- what factors SoundExchange
11 considered in arriving at the rates in the NAB deal,
12 right?

13 A An answer to such a question, had I posed
14 it, would not have illuminated or be relevant to my
15 task. My task was to inquire whether or not
16 Dr. Fratrick's methods and findings are sound
17 economics. That is based on my work. It's not based
18 on what SoundExchange thought the right ingredients
19 that would go into the rate would be, since I'm not
20 proposing a rate. If I were to be proposing a rate,
21 of course I would have to do additional, different
22 kind of work.

1 MR. MacDONALD: Your Honors, I have probably
2 another approximately 30 minutes of questions. I can
3 continue onward or --

4 CHIEF JUDGE SLEDGE: Go ahead.

5 MR. MacDONALD: Okay.

6 BY MR. MacDONALD:

7 Q Let's turn to section IV.A, Dr. Ordoover.
8 This is about the higher cost structures of commercial
9 webcasters. Do you see where I'm referring to,
10 starting on page 14?

11 A Yes.

12 Q You agree, do you not, that the economics of
13 a simulcaster are quite different from an
14 Internet-only webcaster?

15 A Yes.

16 Q A simulcaster may or may not look to the
17 webcasting portion of their operations as a profit
18 center, correct?

19 A That is true. They will be looking at the
20 synergistic economic model, which includes their
21 terrestrial revenues and their webcasting revenues and
22 the interaction between those two.

1 Q In fact, the terrestrial broadcaster may be
2 satisfied with running their simulcasting operations
3 that would not be profitable on its own, so long as
4 the simulcasting side is bringing more listeners to a
5 particular radio station, correct?

6 A Exactly. Entirely consistent with my
7 discussion of the platforms and the complicated
8 platforms pricing.

9 Q And that same principle applies to
10 Sirius/XM, correct?

11 A Yes, it could. Yes.

12 Q But most nonsimulcasting webcasters,
13 including, you know, Internet-only webcasters, don't
14 have that sort of same platform that you described for
15 Live365, for the simulcasters, for Sirius/XM, right?

16 A They have different kind of platforms. We
17 discussed the Live365 platform which is quite
18 different from some other webcasters.

19 Q Excluding Live365 I think was part of the
20 question. There are nonsimulcasting webcasters that
21 don't have the same platform that Live, simulcasters
22 and Sirius/XM have?

1 A They have platforms that are similar in some
2 respects and dissimilar in others. Each of those
3 webcasters who relies on advertising revenues has a
4 two-sided platform, basically like the newspaper. On
5 one hand, you have the readers or listeners. On the
6 other hand, you have advertisers.

7 And the platform which is a newspaper, a
8 platform which is a webcaster connects the listeners
9 to the advertisers. And that's the mechanism that
10 defrays the costs of running the operation and
11 hopefully generates some above-competitive rate of
12 return. Sometimes it doesn't. Sometimes it does.

13 Q Because of the different economics between a
14 simulcaster and an Internet-only webcaster, one would
15 expect that in the marketplace the willing buyers and
16 willing sellers will negotiate different rates to
17 account for those differences between a simulcaster
18 and an Internet-only webcaster, correct?

19 A To the extent that those differences are
20 material, they might negotiate different rates. But
21 to the extent that they are not, the rates may be
22 quite similar.

1 So the -- I have -- anyway, that's all I
2 can say.

3 Q Aren't the differences in terms of the
4 economics between a simulcaster and Internet-only
5 webcaster significant?

6 A They are in the sense of the revenue
7 potentially going from different sources.

8 For example, simulcasters do not have
9 subscription services, unlike Sirius, which is only
10 subscription. So their economics is also different.

11 Q That would suggest in the marketplace
12 different rates between Sirius/XM and an Internet-only
13 webcaster that doesn't have very much subscription,
14 correct?

15 A Not necessarily. Because from the
16 standpoint of the SoundExchange clients or members,
17 what matters, as we discussed earlier on, is the
18 overall effect of these rates on the revenues that
19 flow to SoundExchange and then are redistributed to
20 the proper economic agents.

21 So from the standpoint of SoundExchange
22 and its members, it's the aggregate flows of revenue

1 that matter. And, therefore, the cannibalization
2 and stimulation considerations enter at that place.

3 Q Well, from the webcasting service
4 perspective, the extent to which the rates will differ
5 between a simulcaster on one hand or an Internet-only
6 webcaster on the other hand would be linked to the
7 differences in incremental costs, incremental
8 revenues, which affects a buyer's willingness to pay,
9 correct?

10 A Buyer's willingness to pay depends on the
11 incremental revenues and incremental costs associated
12 with a particular service at issue, yes.

13 Q And you're aware, as a matter of reality,
14 there are differences in the actual rates being paid
15 between simulcasters on one hand on nonsimulcasters on
16 the other hand, correct?

17 A As a matter of reality, yes.

18 Q I want to turn your attention to
19 footnote 39, which appears at page --

20 A Got it.

21 Q -- 15.

22 A Yep.

1 Q You state in the last sentence of
2 footnote 39 --

3 CHIEF JUDGE SLEDGE: Please speak up.

4 MR. MacDONALD: Sorry, Your Honor.

5 BY MR. MacDONALD:

6 Q You state in the last sentence of
7 footnote 39, I think this was in response to Judge
8 Roberts' question, that copyright holders are
9 unlikely -- I'm paraphrasing here -- unlikely to have
10 any incentive to lower rates to higher-cost webcasters
11 because they will divert listening from webcasters who
12 pay higher rates, correct?

13 A I think it's important, as I stated earlier,
14 to read the whole sentence. The front part I think is
15 critical. And it says: "Absent such meaningful
16 product differentiation from the entrant, the
17 webcaster, the seller of the right will have no
18 incentive to offer lower rates because such" -- then I
19 go on to explain why. Basically the reason being that
20 differential rates leads to cannibalization; whereas,
21 in fact, what the seller wants is stimulation. Or at
22 least net stimulation as opposed to gross stimulation.

1 Q But you're aware, as a matter of fact, that
2 copyright holders have agreed to lower rates to
3 higher-cost webcasters, correct?

4 MR. HANDZO: Objection, Your Honor, if we're
5 trying to get into nonprecedential deals now. It
6 sounds like we are.

7 CHIEF JUDGE SLEDGE: Mr. MacDonald.

8 MR. MacDONALD: I'm not, Your Honor.
9 Section 114(f)(5)(C) prevents the admissibility of the
10 rates, the rate structures and the like. And I'm not
11 getting into any of those.

12 CHIEF JUDGE SLEDGE: And you asked him if he
13 is aware of other rates and what?

14 MR. MacDONALD: That copyright holders have
15 agreed to lower rates for higher-cost webcasters, as a
16 matter of fact, as a matter of reality, without
17 getting into any of the rates or any of the provisions
18 in any of those agreements, the nonprecedential ones.

19 CHIEF JUDGE SLEDGE: Your "lower" is the
20 problem. Objection sustained.

21 BY MR. MacDONALD:

22 Q Now, also in footnote 39, you have this

1 discussion, I think you talked about it earlier, about
2 opening a new pool of demand. And I think in
3 paragraph 39 -- or, sorry, footnote 39, your words
4 are, "to fill an important consumer demand." Do you
5 recall that discussion?

6 A Yes. I talk about stimulating net consumer
7 demand for music beyond existing levels.

8 Q In other words, if a new pool of demand is
9 open, then SoundExchange might have incentive to offer
10 lower rates to higher-cost webcasters, correct?

11 A It might, at least for some period of time,
12 yes.

13 Q Does an aggregator of thousands of radio
14 stations, is that possible that that could fill an
15 important consumer demand?

16 A I would be dubious, because the aggregator
17 doesn't provide anything new from the listener's
18 standpoint. It provides thousands of radio stations,
19 many of which are similar, available from a variety of
20 other sources.

21 So, as we had pleasant conversation
22 about it during my deposition, I talked about

1 listening to, I don't know why, but to French pop of
2 1970s. And actually subsequent to it, I went to the
3 web and found that I can listen to the pop from the
4 1970s from at least two or three different radio
5 stations.

6 So the space of webcasting offerings is
7 fairly densely packed. But I'm not denying that
8 someone may not come up with a brand-new vision that
9 would, indeed, stimulate listening substantially
10 relative to the diversion effects.

11 Q Are you --

12 JUDGE ROBERTS: Mr. MacDonald, I'm not sure
13 what you mean by an aggregator of thousands of radio
14 stations. Are you talking about what Live365 does?

15 MR. MacDONALD: No. Actually I was
16 purposely being broader. I was trying to get at
17 Live365's definition of a qualified aggregation
18 service.

19 JUDGE ROBERTS: Okay. When you say an
20 aggregator of thousands of radio stations, that would
21 mean an aggregator of thousands of over-the-air
22 terrestrial radio stations? Is that what you're

1 asking the witness?

2 MR. MacDONALD: I see the distinction that
3 you're trying to make. And, no, that's not the
4 question. And I should have been more precise.

5 JUDGE ROBERTS: Okay. Then you need to be
6 more specific along the lines of what we discussed
7 about with respect to at least Live365 making the
8 distinction between a webcasting business and radio
9 and broadcast and other such terms.

10 So please ask the question again so that
11 I understand exactly what it is you're asking.

12 MR. MacDONALD: Thank you, Your Honor.

13 BY MR. MacDONALD:

14 Q Are you denying that an aggregator of
15 thousands of Internet-only stations that are streamed
16 do not fill an important consumer demand?

17 JUDGE WISNIEWSKI: I'm still not
18 understanding the question because of your previous
19 comments to Judge Roberts when you were saying you
20 were trying to use the definition of aggregator that
21 Live365 has in its proposal, and that is not the
22 definition that they have in their proposal.

1 MR. MacDONALD: That's correct. I'll try
2 the question again.

3 BY MR. MacDONALD:

4 Q Are you denying, Dr. Ordoover, that an
5 aggregator of at least 100 Internet stations could not
6 fill an important consumer --

7 JUDGE WISNIEWSKI: Let me stop you again,
8 Mr. MacDonald, because you're still not hitting the
9 definition that you have proposed yourselves.

10 MR. MacDONALD: Well, if I may.

11 JUDGE WISNIEWSKI: I think you need to go
12 back and refresh yourself on that definition.

13 MR. MacDONALD: I probably do need to, Your
14 Honor. If I may, can I -- I would like to actually
15 extend it beyond just the narrow definition that Live
16 has proposed.

17 JUDGE WISNIEWSKI: Please feel free.

18 MR. MacDONALD: Thank you, Your Honor.

19 BY MR. MacDONALD:

20 Q Would you like the question again,
21 Dr. Ordoover?

22 A Yes. I -- yes. I sort of lost it a while

1 ago.

2 Q Do you deny that an aggregator of at least
3 100 Internet-only radio stations do not fill an
4 important consumer demand?

5 A There's too many negatives. I would say
6 that, based on your question, the answer would be, who
7 can tell. If that service aggregates 100 stations,
8 all of which are, for example, versions of top rock
9 and roll hits of 1960, I would say that that
10 aggregator likely serves a very weak role in expanding
11 demand. Because wherever you turn on the web, there
12 appears to be yet another radio station that makes --
13 that programs rock and roll from 1960s or 1970s,
14 1980s. There are dozens and dozens of those.

15 And, therefore, an aggregation of such
16 services under the one umbrella of a webcaster I
17 believe likely will expand the aggregate listening
18 hours by very little, if at all. Because anybody
19 who wants to listen to 1960s rock and roll, in all
20 of its possible permutations, is likely to be able
21 to hear that kind of music, if one is so inclined,
22 from dozens of stations already.

1 So you cannot just call somebody an
2 aggregator and think that you have accomplished
3 something of any social value. In fact, research
4 shows that, in the radio spectrum, in the radio --
5 terrestrial radio, there is too much clumping so
6 that the -- there is too many radio stations which
7 are exactly alike. And I refer you to the work of
8 Professor Steve Berry of Yale University that has
9 analyzed that issue a great deal, because we have a
10 lot of information on that subject.

11 So, indeed, if anything, the economics
12 teaches us that there is too much of that kind of
13 stuff out there as opposed to too little.

14 Q Let's turn to the next section of your
15 report --

16 A Sure.

17 Q -- section B, the threat of litigation
18 section.

19 A Got it.

20 Q Now, Dr. Fratrik, as you may recall, argues
21 that the desire to avoid litigation costs against
22 SoundExchange led the NAB to agree to higher rates

1 relative to those that would be obtained in the
2 absence of a regulatory proceeding, correct?

3 A I think that's a fair reading of what he has
4 to be saying. Otherwise, he could not be objecting to
5 these rates. He's likely to be objecting to the rates
6 which are elevated relative to what he considers to be
7 the appropriate level.

8 Q And your position is that both NAB and
9 SoundExchange wish to avoid the cost of litigation,
10 correct?

11 A Both would like to avoid the cost of
12 litigation. Each would like to get the rate that it
13 thinks is more likely satisfying the willing
14 buyer/willing seller standard, as the judges interpret
15 it.

16 Q And it's your testimony that avoiding
17 litigation costs was not one-sided for the NAB,
18 correct?

19 A Yes. Both parties pay litigation costs.
20 And I disagree with Dr. Fratrick's assertion that just
21 because each side pays for those differently, that
22 somehow the scales are stacked against NAB as opposed

1 to SoundExchange.

2 Q Once NAB settled with SoundExchange under
3 the WSA agreement, it is fair to say that the NAB
4 entities did not anticipate any further litigation
5 costs in this CRB proceeding, correct?

6 A I presume once the rate is set, the rate is
7 set. I don't know if anybody has the right to get up
8 there and start complaining about it. But let's say
9 it's done and over with, yes.

10 Q But the converse is not necessarily true.
11 In other words, even after SoundExchange settled out
12 with the NAB in 2009, SoundExchange likely knew, did
13 it not, that it would still need to incur litigation
14 costs in this proceeding?

15 A I don't know what SoundExchange knew. I
16 believe that all parties would like to settle and
17 avoid litigation costs if they can hope for the rates
18 that best, from their perspective, best satisfy
19 willing buyer/willing seller standard.

20 Q You didn't speak to SoundExchange about what
21 additional litigation cost, if any, it expected to
22 incur in this proceeding after NAB settled out,

1 correct?

2 A That is true. But settling with an
3 organization that represents, at that time, 50 percent
4 of the streaming demand I believe is a valuable
5 settlement.

6 Q But you can't quantify the litigation costs
7 that SoundExchange would save by entering into the NAB
8 agreement, correct?

9 A Right. I did not try to do that.

10 Q Turning to the next section, the performance
11 complement waiver section. Obtaining a waiver of the
12 performance complement requirement had value to the
13 simulcasters, as I think we've established already,
14 correct?

15 A Yes. At least to some. I'm not saying to
16 all. I'm being clear that it could be a value to
17 some, but not all.

18 Q And it has value to simulcasters because
19 they would potentially have to reprogram their streams
20 of their terrestrial broadcasts, correct?

21 A That's the source of the value, yes.

22 Q And that would be costly to reprogram,

1 correct?

2 A That is true depending on the volume. The
3 quantum of cost would depend how much of reprogramming
4 one would have to do and whether or not one can get
5 particular waivers for particular deviation such as
6 having a lot of Beatles song on the anniversary of --
7 some Beatles anniversary, or Rolling Stones song at
8 the time of the release of their new CD.

9 Q You didn't attempt to quantify those costs,
10 did you?

11 A No.

12 Q Nor have you attempted to quantify the value
13 of the performance complement waivers to simulcasters,
14 correct?

15 A That is true. I point out, however, that it
16 was of some value because at least we have seen entry
17 of simulcasters that otherwise may be compelled to
18 reprogram, and thereby they avoided the cost of doing
19 so.

20 Q I think you cite over 300 individual
21 stations have entered into the NAB deal since the
22 entry of the NAB deal, correct?

1 A That is true.

2 Q Are you aware that there's currently over
3 14,500 stations in the US?

4 A Yes, I am. There's thousands and thousands
5 of terrestrial stations in the US.

6 Q Now, going to the next section of your
7 report about SoundExchange NAB rates being elevated as
8 a result of market power by SoundExchange.

9 JUDGE WISNIEWSKI: Actually before you get
10 there, I am not quite sure of the relevance of that
11 question. So let me follow up here a bit.

12 Of those thousands of terrestrial
13 stations that you mentioned, how many in fact are --
14 were simulcasting before the agreement and how many
15 were simulcasting afterwards? Do you know?

16 THE WITNESS: I don't know the breakdown. I
17 do know that there was the influx of the new
18 simulcasters. But what the breakdown is as we speak,
19 that, I don't know. I agree with Your Honor about the
20 relevancy. The relevancy that I was pointing to is
21 that both -- when you combine the rates that they are
22 paying with the benefit of the waiver, it appears to

1 be stimulative to the demand for --

2 JUDGE WISNIEWSKI: Let me stop you there.

3 That's not the relevancy I was speaking of.

4 Okay. Mr. MacDonald.

5 MR. MacDONALD: Thank you.

6 BY MR. MacDONALD:

7 Q Now, the title of your section IV.E is
8 "There is no basis to conclude that the SoundExchange
9 NAB rates are elevated as a result of an exercise of
10 market power by SoundExchange."

11 A Yes.

12 Q Dr. Fratrik didn't make this conclusion in
13 his written report, did he?

14 A Well, we had that discussion earlier in the
15 day where you challenged the appropriability of my
16 testimony on the subject. I presume it was allowed to
17 proceed on the grounds that it's sufficiently
18 tangential, sufficiently close to Dr. Fratrik's
19 testimony that I should be allowed to testify on the
20 subject. So I am here to testify if you ask me
21 questions.

22 Q Okay. And I'm asking questions. I

1 actually -- that was argument. I didn't get any
2 verbal testimony at that time. Dr. Fratrick didn't
3 make that conclusion, correct?

4 A Yes. I don't believe him to conclude that
5 the NAB rates were elevated as the result of
6 SoundExchange exercising its market power.

7 MR. MacDONALD: Your Honor, I move for
8 reconsideration on the exclusion of section IV.E given
9 Dr. Ordover's testimony.

10 CHIEF JUDGE SLEDGE: Is that all you're
11 going to say?

12 MR. MacDONALD: Yes.

13 CHIEF JUDGE SLEDGE: Overruled.

14 BY MR. MacDONALD:

15 Q Do you know if anybody from Live365 made
16 this conclusion, Dr. Ordover?

17 A I don't know anybody concluding one way or
18 the other. This is my testimony. And you've
19 challenged it. It's in. If you ask me questions
20 about the merits of it, I will be happy to discuss
21 them with you at this point.

22 Q You describe this overall argument as a

1 theoretical issue, correct?

2 A It's an issue that I thought -- I wanted to
3 address by virtue of the fact that the willing
4 buyer/willing seller standard does address the
5 question of market power, how can it -- how it can
6 distort the outcome of negotiations.

7 So I thought that it would be
8 appropriate for me to say something in light,
9 especially, of the new learning that we have in the
10 area of licensing, and in particular how it applies
11 to NAB.

12 Q You would agree, would you not, that there
13 would be concerns about SoundExchange's bargaining
14 power if they effectively replaced the record labels
15 such that SoundExchange was effectively the only
16 seller in the marketplace, right?

17 A Well, I presume they are allowed to -- since
18 they were allowed to negotiate on behalf of the record
19 labels, the majors and the independents, I presume
20 those concerns have been laid aside for reasons -- we
21 have a legislative history and other history to
22 explain why that has happened.

1 Q But you're not aware of a single contract
2 negotiated directly between statutory webcasters on
3 one hand and any of the major record labels on the
4 other hand, are you?

5 A They may have such contracts relating to
6 other things than webcasting. I don't know if that's
7 --

8 Q But for statutory webcasting, you're not
9 aware of any deals between the record labels on one
10 hand -- any of the major record labels on one hand and
11 the statutory webcasting service --

12 A In the narrow ambit of licensing rights for
13 webcasting, my answer would be I'm not aware of any
14 such. Yes.

15 Q You would agree that, practically speaking,
16 looking only at the statutory webcasting market,
17 SoundExchange is the only seller in the marketplace,
18 correct? As a practical matter. And as a historical
19 matter.

20 A It is the, historically, the only party
21 negotiating these deals as far as I know.

22 Q On behalf of the seller, correct?

1 A Sorry?

2 Q On behalf of the seller?

3 A On behalf of the record companies. Majors
4 and independents.

5 Q So putting aside economic theory for the
6 time, SoundExchange has been de facto the only seller
7 in the marketplace for licensing statutory webcasting
8 rights, correct?

9 A In the two instances that I know of,
10 Webcasting II and Webcasting III, yes. And the whole
11 purpose of this section is to explain why, based on
12 some important economic thinking, that outcome does
13 not necessarily imply, in the context of the NAB
14 negotiations, the resultant rate would be higher than
15 what it would be negotiated if the transactions were
16 between NAB and individual record labels -- and
17 individual record labels.

18 Q Turning your attention to the latter part of
19 paragraph 49, which starts at page 23, but my question
20 pertains to the top of page 24, you see that sentence
21 about, if one assumes that the catalog of all four
22 major -- all four majors are needed?

1 A Right.

2 Q Okay. You haven't undertaken any
3 independent assessment regarding the validity of the
4 assumption made in that sentence with respect to all
5 webcasters, right?

6 A That is true. But I do have a citation to
7 one Robert Roback who testified to that point. And I
8 think that it makes also reasonable economic sense,
9 based on the familiarity with terrestrial
10 broadcasting, that a broadcaster would need access to
11 the repertoires of the four majors and probably many
12 independents in order to have an attractive,
13 competitive offering.

14 Q Are you aware that this court has observed
15 otherwise, that not all major labels are required to
16 run a viable service?

17 A Yes. I am aware of that. And the Court
18 said that in Webcasting II. And if you read my
19 testimony, I narrow it down to the programming of the
20 major -- to broadcaster, terrestrial broadcasters. I
21 do believe that if one has a webcast that streams
22 Polish marching songs, one does not need -- or French

1 pop from '70s, one does not need access to all the
2 majors and even to most of the independents. But I'm
3 not talking about that --

4 JUDGE WISNIEWSKI: Actually the catalog in
5 the majors for Polish marching songs is quite large.

6 THE WITNESS: Yes, I -- thank you very much
7 for that correction, Your Honor. Next time I start my
8 own webcasting, I will make sure that I have full
9 access.

10 So I am talking about the NAB rate. I'm
11 not talking about anything else. I'm just focusing
12 on that particular segment of the webcasting
13 industry, which is the rebroadcast or streaming of
14 terrestrial programming.

15 BY MR. MacDONALD:

16 Q At the time you prepared this report, you
17 hadn't read the Webcasting II determination, correct?

18 A No. But I understood historically, and the
19 same issue came up when I testified here on the rates
20 for satellite radio as to the issue of market power
21 and the supra-competitive prices or below competitive
22 prices that may arise as a result of one side or the

1 other trying to exercise its market power.

2 So I only -- I felt it was important to
3 address it, and in particular to try to present some
4 of the learning that has emerged over the last years
5 that precisely addresses that issue in the area of
6 licensing intellectual property rights.

7 Q But at the time you prepared this report you
8 didn't have the knowledge that this Court has already
9 observed that not all major labels are required to run
10 a viable webcast -- statutory webcasting service?

11 A That I didn't know precisely. That's why,
12 as you can read well, the section, it only deals with
13 the NAB rates, for which I thought the argument that I
14 am trying to develop is particularly apt. It may not
15 be apt to some other webcasting operations which can
16 function with a much narrower range of input and still
17 be viable and competitive.

18 Q Dr. Ordoover, you're aware that Dr. Fratrik
19 has a discussion in his report about the general state
20 of the webcasting industry, correct?

21 A Yes. I recall some of that discussion as I
22 sit here.

1 Q And in connection with your report you've
2 done at least a cursory assessment of the webcasting
3 industry, correct?

4 A Yes. I reviewed publicly available
5 information. I did not develop my own econometric
6 studies of the industry.

7 Q And based on that publicly available
8 information that you reviewed, you are aware that
9 growth rates for the webcasting industry have, in
10 fact, slowed down, correct?

11 A They may have slowed down, yes. I think
12 that, when it comes to the revenue growth, I don't
13 believe that, from what I know, that the revenues have
14 declined substantially as between 2009 -- projected
15 for 2010.

16 So it's an industry like all industries
17 that have experienced problems as a result of the --
18 as a result of the great recession. But I don't
19 believe that it has such -- I have not read it as
20 being in such dire straits as, for example, the
21 automotive sector or some aspects of the financial
22 sector.

1 Q It's a verifiable statement, is it not, that
2 the industry growth has slowed down relative to what
3 the expectations were a few years ago, correct?

4 A That's what Dr. Fratrik says, that
5 expectations have been to some extent frustrated, yes.

6 Q But -- and you know that -- separate from
7 Dr. Fratrik, you know that's a verifiable statement,
8 that the industry growth has slowed down in the last
9 few years compared to what was predicted, correct?

10 A There is verifiable information suggesting
11 that industry growth has slowed down. Whether it's
12 slowed down permanently or just for the next year or
13 so, I don't think anybody knows that. And, therefore,
14 I'm not forecasting that the industry is in dire
15 straits. And neither am I forecasting -- but what I
16 am going to say, as my parting words, perhaps, is just
17 because the industry may have suffered, the recording
18 industry has not done so well for itself either.
19 Therefore, from the economic standpoint, I'm not of
20 the view that just the relief is appropriate for one
21 side but not for the other.

22 Q Thank you, Dr. Ordover.

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1 MR. MacDONALD: I have no further questions.

2 CHIEF JUDGE SLEDGE: Thank you. Any
3 questions, Mr. Malone?

4 MR. MALONE: We have no questions.

5 CHIEF JUDGE SLEDGE: Any redirect?

6 MR. HANDZO: No, Your Honor.

7 CHIEF JUDGE SLEDGE: Any questions from the
8 bench?

9 JUDGE ROBERTS: No, sir.

10 CHIEF JUDGE SLEDGE: Thank you, sir. You're
11 excused.

12 THE WITNESS: Thank you.

13 CHIEF JUDGE SLEDGE: We'll recess for one
14 hour.

15 (Whereupon, at 12:25 p.m., the hearing was
16 recessed, to be reconvened at 1:25 p.m. this
17 same day.)

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1 AFTERNOON SESSION

2 (1:30 p.m.)

3 CHIEF JUDGE SLEDGE: Mr. Freedman.

4 MR. FREEDMAN: Yes, Your Honor.

5 SoundExchange calls its next witness. Kyle Funn.

6 CHIEF JUDGE SLEDGE: Okay.

7 Mr. Funn, please raise your right hand.

8 Whereupon,

9 KYLE FUNN

10 was called as a witness, and, having first been duly

11 sworn, was examined and testified as follows:

12 DIRECT EXAMINATION

13 BY MR. FREEDMAN:

14 Q Good afternoon.

15 A Good afternoon.

16 Q Could you please state your name for the
17 record?

18 A Sure. It's Kyle Funn.

19 Q And where are you currently employed,
20 Mr. Funn?

21 A SoundExchange.

22 Q What is your job title?

1 A Currently it's manager of licensing and
2 enforcement.

3 Q What are your job responsibilities in that
4 position?

5 A Primarily my role is to work with licensees
6 and potential licensees, sort of understand the
7 regulations and sort of assist them with maintaining
8 compliance with the regs. I also sort of have some
9 oversight in some of our more regularized enforcement
10 processes.

11 Q And before your current position, what
12 position did you hold at SoundExchange?

13 A I was the licensing and enforcement
14 specialist.

15 Q What were your responsibilities in that job?

16 A Pretty much the same responsibilities except
17 I didn't have much of a managerial role. So, you
18 know, it included working with -- closely with
19 licensees, as well as interdepartmentally with our
20 finance department and our distribution services
21 departments.

22 Q Do -- how long have you worked at

1 SoundExchange?

2 A Since 2005.

3 Q And do you have plans to leave your
4 employment at SoundExchange soon?

5 A Yes.

6 Q When will that be?

7 A At the end of this week, actually.

8 Q And what are you going off to do?

9 A I'm going to law school.

10 MR. FREEDMAN: Your Honor, may I approach?

11 CHIEF JUDGE SLEDGE: Has anyone counseled
12 you on that?

13 THE WITNESS: Yeah. A number of folks have
14 tried to talk me out of it, Judge.

15 CHIEF JUDGE SLEDGE: Yes.

16 THE WITNESS: I'm hard-headed.

17 BY MR. FREEDMAN:

18 Q Mr. Funn, I've put in front of you what I've
19 marked as SoundExchange Trial Exhibit 46.

20 A Okay.

21 Q Can you open the cover, please, to the first
22 document. Do you recognize this document?

1 A Yes, I do.

2 Q And what is it?

3 A It is my written rebuttal testimony in this
4 proceeding.

5 Q If you turn to the last page of that first
6 document, is that your signature?

7 A Yes, it is.

8 Q Did you prepare this document?

9 A Yes, I did.

10 Q Did you review it before you signed it?

11 A Yes.

12 Q Is the written testimony true and correct?

13 A Yes.

14 Q Now, do you see there are two tabs behind
15 it? I'd like for you to turn to the first tab,
16 please.

17 A Okay.

18 Q What is this document?

19 A This is the 2009 statement of account for
20 commercial webcasters that are paying at the current
21 rates adopted by the Copyright Royalty Board.

22 Q Is this a SoundExchange form?

1 A Yes, it is.

2 Q Did you help prepare this form?

3 A Yes, I did.

4 Q Does SoundExchange make it available to
5 webcasters?

6 A Yes, we do, on the SoundExchange web site.
7 And, you know, we also make it available at
8 webcasters' request.

9 Q If I could please have you turn to the
10 second tab behind your written testimony.

11 A Okay.

12 Q Do you recognize this document?

13 A Yes.

14 Q And what is it?

15 A It is the October 2009 statement of account
16 provided by Live365.

17 Q And provided by -- to whom?

18 A Oh, to SoundExchange, by Live365.

19 Q Did you see this document in the ordinary
20 course of business?

21 A Yes, I did.

22 MR. FREEDMAN: Your Honor, at this time I

1 move the admission of SoundExchange Trial Exhibit 46
2 into evidence.

3 CHIEF JUDGE SLEDGE: Any objections to
4 Exhibit 46?

5 MR. OXENFORD: Yes, Your Honor. Live365
6 would like to object to the exhibit beginning at the
7 top of page 2 through the end of the first paragraph
8 on page 4.

9 Our argument, Your Honor, is that this
10 exhibit does not rebut the direct case testimony of
11 Live365. Dr. Fratrick, when testifying about an
12 aggregator discount, talked about an aggregator
13 discount with respect to an industry-wide rate. He
14 did not talk about an aggregator discount with
15 respect to Live365 in particular. He talked about
16 it as an industry-wide rate. He talked about
17 industry-wide savings that SoundExchange could
18 achieve. He talked about comparables in other
19 industries giving aggregator discounts in connection
20 with ASCAP and BMI.

21 The entire testimony that we seek to
22 have struck is dealing solely with alleged

1 compliance issues of Live365 that have nothing to do
2 with this broader general question about whether an
3 aggregator discount is appropriate.

4 While certainly Your Honor has ruled
5 that compliance issues may be relevant to impeaching
6 the testimony or weighing the credibility of
7 particular witnesses who are testifying, that is not
8 the case here. This evidence is seemingly being
9 used to bolster arguments that somehow Live365 is a
10 bad actor. Whether or not we're a bad actor -- and
11 we certainly would be prepared to challenge whether
12 some of these issues are violations or problems at
13 all -- has nothing to do with whether a discount is
14 provided to an aggregator or not. It's a question
15 that would apply to any webcaster, regardless of
16 what class they sought to be included.

17 So this testimony is both irrelevant and
18 on -- and is not a rebuttal to the testimony of
19 Dr. Fratrik.

20 CHIEF JUDGE SLEDGE: Your response.

21 MR. FREEDMAN: Yes, Your Honor. If Live365
22 wants to cross-examine Mr. Funn about what it

1 perceives to be the limitations of his testimony, I
2 think they're free to do so. And that's basically
3 what I understand Mr. Oxenford to be describing here.

4 Live365 has proposed an aggregator
5 discount. And they've defined the eligible parties
6 for that discount in such a way that it clearly
7 applies to them and to our knowledge does not apply
8 to other services or other entities who are paying
9 SoundExchange now.

10 So while they can act as if somehow this
11 is about a discount for any number of services, in
12 reality, this is a Live365 discount they're asking
13 for. And Mr. Funn's testimony provides rebuttal to
14 that.

15 CHIEF JUDGE SLEDGE: Yes, sir.

16 MR. OXENFORD: Your Honor, I believe that
17 there -- I'm sorry. I shouldn't even say believe.
18 There have in fact been aggregators in the past. And
19 there's nothing to say that there won't be aggregators
20 in the future. So this is an industry-wide rate, not
21 one directed to Live365.

22 CHIEF JUDGE SLEDGE: Thank you.

1 All right. We'll recess.

2 (Whereupon, a recess was taken between
3 1:40 p.m. and 1:52 p.m.)

4 CHIEF JUDGE SLEDGE: On the objection to the
5 portions of the written testimony that it is not
6 proper rebuttal and that it's not relevant, the
7 Live365 Exhibit 29 of the testimony of Johnie Floater
8 at page 11 addresses at length the benefits from
9 Live365 as an aggregator. The testimony of
10 Dr. Fratrik, Exhibit 30, at page 38 describes the
11 benefits of Live365 as an aggregator. The conclusion
12 is that the testimony is both relevant and rebuttal of
13 direct evidence.

14 The exhibit is admitted.

15 (SoundExchange Exhibit Number 46 was
16 received into evidence.)

17 CHIEF JUDGE SLEDGE: Yes, sir.

18 MR. OXENFORD: Your Honor, we just ask that
19 the protective order be extended to tab 2.

20 CHIEF JUDGE SLEDGE: Any objection?

21 MR. FREEDMAN: No, Your Honor.

22 CHIEF JUDGE SLEDGE: Motion is granted.

1 All right.

2 BY MR. FREEDMAN:

3 Q Mr. Funn, do you recall that Live365 is
4 seeking a discount in this proceeding for services
5 that meet a certain definition of webcast aggregation
6 service?

7 A Yes.

8 Q What is your understanding about whether
9 Live365 would meet that definition?

10 A I believe they do.

11 Q And are you aware of other services that pay
12 royalties --

13 JUDGE WISNIEWSKI: You may have to explain
14 that to us.

15 THE WITNESS: I'm sorry?

16 JUDGE WISNIEWSKI: You may have to explain
17 that to us because that's been a problem from the
18 beginning of this proceeding.

19 THE WITNESS: In the --

20 JUDGE WISNIEWSKI: I want to hear what your
21 understanding is.

22 THE WITNESS: Oh. It's my understanding

1 that by, I believe the term is webcasting aggregation
2 service, they mean a service that operates under the
3 statutory license on behalf of at least 100
4 independently operated services, which would include
5 paying royalties on their behalf.

6 JUDGE WISNIEWSKI: Are they a service or are
7 the other folks the 100 services? Who is the
8 webcaster? That's the question.

9 THE WITNESS: I see. Well, I'm not sure I
10 know enough about Live365's business to say whether
11 they would technically be considered a webcaster under
12 the statute. The only thing that I know is that they
13 purport to operate under the statute --

14 JUDGE WISNIEWSKI: I --

15 THE WITNESS: -- under a statutory license.

16 JUDGE WISNIEWSKI: I'm trying to get to your
17 understanding here. It's important because what your
18 counsel asked you about was in the context of the
19 proposal that Live365 has made here.

20 THE WITNESS: Sure.

21 JUDGE WISNIEWSKI: And so the question that
22 is raised is whether -- what your understanding of

1 their business is relative to that proposal.

2 THE WITNESS: Well, at least -- I believe at
3 least some portion of their business consists of
4 making eligible transmissions on behalf of a number of
5 webcasters. I just don't know if that's exclusively
6 their business or not.

7 JUDGE WISNIEWSKI: Thank you.

8 CHIEF JUDGE SLEDGE: So the answer to your
9 question earlier, you're qualifying it? The earlier
10 question to you is, under their proposal, do they
11 qualify. And you said yes.

12 THE WITNESS: Yes.

13 CHIEF JUDGE SLEDGE: So now I hear you not
14 so categorically saying yes.

15 THE WITNESS: Well, under the assumption
16 that they are eligible for the statutory license.

17 CHIEF JUDGE SLEDGE: Well, that's a big
18 assumption.

19 THE WITNESS: Right. Understood.

20 CHIEF JUDGE SLEDGE: So with that
21 assumption, then your answer is yes?

22 THE WITNESS: Yes. Correct.

1 CHIEF JUDGE SLEDGE: And on what basis do
2 you make that assumption?

3 THE WITNESS: Because they filed a notice of
4 use for the statutory license.

5 CHIEF JUDGE SLEDGE: All right.

6 THE WITNESS: And they purport to operate
7 under the statutory license.

8 CHIEF JUDGE SLEDGE: And that's all you know
9 is what they've filed?

10 THE WITNESS: Right. And my understanding
11 of at least some portion of their business, as I
12 explained to Your Honors.

13 CHIEF JUDGE SLEDGE: Okay.

14 JUDGE ROBERTS: Mr. Funn, in your experience
15 at SoundExchange, is there any practical difference
16 between a webcaster that files a statement of account
17 and aggregates 100 stations, versus a webcaster that
18 files a statement of account and reports 100 channels?

19 THE WITNESS: Well, looking at them
20 operationally, no.

21 JUDGE ROBERTS: I'm talking about from
22 SoundExchange's perspective.

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1 THE WITNESS: Right. Yeah.

2 JUDGE ROBERTS: You get a statement of
3 account.

4 THE WITNESS: Uh-huh.

5 JUDGE ROBERTS: One statement of account in
6 each instance. One that is purportedly aggregating
7 100 stations.

8 THE WITNESS: Yeah.

9 JUDGE ROBERTS: The other that is reporting
10 100 channels.

11 THE WITNESS: Right.

12 JUDGE ROBERTS: Is there any different
13 treatment that is given at SoundExchange between those
14 two?

15 THE WITNESS: No. Not that I can think of.
16 As I stand here today, no.

17 JUDGE ROBERTS: Is there any other factor
18 that you would recognize in looking at those two and
19 saying that I need to do something different with this
20 one versus the other? Does it matter to you whether
21 they report 100 aggregated stations on the one hand or
22 another reporting 100 channels?

1 THE WITNESS: Not really, no. I mean, we
2 would essentially treat them as the same if I
3 understand your question correctly. I guess there's
4 the possibility, at least with respect to a service
5 that aggregates 100 independent services, there's a
6 possibility that, in the absence of that, there would
7 be 100 services operating under the statutory license
8 whereby, you know, it's unlikely that there would be
9 100 channels operating under the statutory license.
10 Individually I mean.

11 JUDGE ROBERTS: So in that instance, the one
12 that was aggregating, if they weren't doing that, you
13 might get 100 statements of account.

14 THE WITNESS: That's right.

15 JUDGE ROBERTS: Whereas, the one that was
16 providing 100 channels, you would still get one
17 statement?

18 THE WITNESS: Probably, yes.

19 CHIEF JUDGE SLEDGE: All right. Continue,
20 Mr. Freedman.

21 BY MR. FREEDMAN:

22 Q Are you aware of other services that

1 currently pay royalties to SoundExchange that do meet
2 Live365's definition of webcast aggregation service?

3 A I -- I cannot think of any, no.

4 Q Now, after the Webcasting II decision, did
5 Live365 pay SoundExchange at the correct royalty
6 rates?

7 A No, they did not.

8 Q And approximately how long did that last?

9 A Roughly 2-1/2 years, a little more than
10 2-1/2 years, I believe.

11 Q And during that time did SoundExchange ever
12 inform Live365 that Live was not in compliance with
13 the Webcasting II decision?

14 A Yes. At least three times in writing.

15 Q And what form did those writings take?

16 A They were in the form of letters.

17 Q Did the letters address the issue of whether
18 Live365's noncompliance -- of its noncompliance?

19 MR. OXENFORD: Objection, Your Honor. Just
20 for the record, we object to this line of questioning
21 as irrelevant to the issue that we're determining here
22 for the industry rate as opposed to Live365's

1 particular compliance.

2 CHIEF JUDGE SLEDGE: That was already raised
3 in the earlier motion. And the same ruling.

4 THE WITNESS: I'm sorry. Could you repeat
5 the question.

6 BY MR. FREEDMAN:

7 Q Sure. Did the three letters address the
8 issue of Live365's noncompliance with the Webcasting
9 II decision?

10 A Yes.

11 Q What did they say with respect to the
12 payment at the Webcasting II rates?

13 A Basically the letters said that Live365 was
14 paying at a rate that was no longer in effect. And
15 they needed to comply with the payment regulations by
16 paying at the appropriate rate.

17 Q Did Live365 respond to those letters by
18 paying at the correct rates?

19 A No, they did not.

20 Q On page 2 of your written testimony, in the
21 second paragraph, you say that Live365's decision not
22 to pay royalties in compliance with the Web II

1 decision imposed a burden on SoundExchange?

2 A Yes.

3 Q Can you explain what you mean?

4 A Sure. SoundExchange, in an attempt to gain
5 efficiencies, we designed our processes of collecting
6 and distributing the royalties based on the
7 regulations as they are in effect at the time.

8 So when there is a service that does not
9 comply with the current regulations as they stand,
10 basically our processes are designed to kick those
11 services out of sort of the collection and
12 distribution process.

13 So, particularly with respect to
14 Live365, I mean, you know, for several months they
15 were paying at an incorrect rate, sending incorrect
16 statements of account. So what that meant is we
17 basically had to put them on hold to sort of, you
18 know, resolve whatever discrepancy there was on a
19 month-to-month basis. And I guess Live365 was
20 particularly unique in that they operate on behalf
21 of these thousands of webcasters. So there's a
22 sense where, you know -- there's that question of

1 whether or not these thousands of webcasters would
2 now be out of compliance as a result.

3 Q And when Live365 -- in any of the
4 information that Live365 provides to SoundExchange,
5 does it tell SoundExchange which services it's
6 reporting for?

7 A No, it doesn't.

8 Q And does that raise issues with respect to
9 compliance or monitoring compliance?

10 A Yes, absolutely. I mean, because we don't
11 know who Live365 is paying for, you know, there could
12 be instances where we would contact a service that we
13 believe should be operating under the statutory
14 license and only to find out that they are operating
15 under Live365 and believe that they are in compliance
16 with the license.

17 Q Now, you also referred in your written
18 testimony to Live365's submission of what you called
19 doctored statement of account forms. Do you recall
20 that?

21 A Yes.

22 Q And is tab 2 to your written testimony an

1 example of that?

2 A Yes, it is.

3 Q Can you explain what you were referring to?

4 A Sure. What it looks like here is that what
5 Live365 did was maybe use a statement of account form
6 that was made available by SoundExchange, let's say,
7 back in 2005 when those rates were in effect. But it
8 looked like -- and typically the form is locked, so it
9 prevents making adjustments. But what it looks like
10 here is that they changed the header to give the
11 appearance that the statement of account form
12 corresponds to the 2009 license period, when in fact,
13 if you look at the rate, it obviously does not.

14 Q And does this cause problems for
15 SoundExchange when you receive these?

16 A Sure. Absolutely. I mean, and, again, in
17 terms of our collection processes, one of the things
18 that our finance department does, which is the
19 department that receives the statements of account and
20 payments, they look at the header to verify what rates
21 and terms the service is operating under.

22 So if you have a form that at the header

1 says that it's supposed to be paying the commercial
2 webcaster rates for 2009, and then you look down at
3 the number and notice that that doesn't match what
4 services are supposed to pay for 2009, it creates
5 confusion for them. And they -- you know, it would
6 probably delay processing.

7 Q Does SoundExchange make template statement
8 of account forms available?

9 A Yes, they do.

10 Q And how does it do that?

11 A On the web site, we make them available.

12 Q And is SoundExchange proposing anything in
13 this proceeding related to standardized or template
14 statement of account forms?

15 A Yes. We are requesting that the
16 SoundExchange template be required under the
17 regulations. And it's basically for efficiencies
18 purposes. I mean, it eliminates sort of -- or
19 minimizes the need for human intervention when it
20 comes to processing these documents. You don't have
21 to worry about documents coming in looking different
22 from time to time, raising questions internally. We

1 can just know that this is the SoundExchange form, and
2 we can, you know, easily pull the data off of it.

3 Q I would like to ask you about the last
4 paragraph of your written testimony. In that
5 paragraph, you referred to a benefit that Live365
6 obtains from SoundExchange. Can you explain what you
7 mean in that paragraph?

8 A Sure. By benefit, I'm referring to the cap
9 on the minimum fee, the \$50,000 cap on the minimum
10 fee. Essentially, you know, I believe that that is a
11 benefit for Live365, a service that operates 6,000
12 services, I believe, last I checked. You know, when
13 you take a service that has that many channels or
14 stations, obviously if -- without the minimum fee cap
15 in place, you're talking about a minimum fee
16 obligation that would be in the millions of dollars.
17 So by having this minimum fee cap in place for an
18 aggregator like Live365, they get the benefit of a
19 much lower minimum fee, you know, which sort of goes
20 to our operating costs. You know, it sort of offsets
21 the operating costs.

22 MR. FREEDMAN: Your Honor, I have no further

1 questions at this time.

2 CHIEF JUDGE SLEDGE: Mr. Freedman, I'm
3 puzzled by that last question and this portion of the
4 written testimony. This testimony addresses an
5 agreement made by SoundExchange.

6 MR. FREEDMAN: Yes, Your Honor.

7 CHIEF JUDGE SLEDGE: So why is it being
8 presented as a benefit to Live365 when this is an
9 agreement made by SoundExchange?

10 MR. FREEDMAN: Well, I think because the
11 agreement does provide, as Mr. Funn has testified,
12 does provide Live with a benefit. I may be missing
13 the tenor of your question.

14 CHIEF JUDGE SLEDGE: Well, the agreement is
15 what the parties agreed to. So then to come along and
16 say, well, this is a benefit to one side of the party
17 is a bit disingenuous, isn't it? The agreement is to
18 the best interests of both parties, isn't it?

19 MR. FREEDMAN: Yes, I think that's true,
20 Your Honor. And I don't think his testimony would be
21 different from that. I don't think he's saying that
22 the benefit is all on one side. I think he is

1 pointing out that they do receive a benefit in
2 relationship to their aggregation of a lot of stations
3 and channels.

4 CHIEF JUDGE SLEDGE: I'm curious if that
5 testimony is even admissible because it attempts to
6 interpret an agreement by his employer and cast a
7 light on that agreement as being something other than
8 what it is in the total -- totality of the agreement.

9 MR. FREEDMAN: I do think it's admissible.
10 And if I'm not mistaken, I -- I believe that the
11 \$50,000 cap to which he's referring, you know, also
12 now appears in the Court's regulations. He cites here
13 the -- the stipulation -- excuse me, the final
14 regulations for the current rate period, '06 to '10.

15 CHIEF JUDGE SLEDGE: Right.

16 MR. FREEDMAN: So I think the benefit --

17 CHIEF JUDGE SLEDGE: So that's what he's
18 referring to and not the current stipulation that
19 we've got pending?

20 MR. FREEDMAN: Well, I believe he's
21 referring to both, Your Honor.

22 CHIEF JUDGE SLEDGE: Well, as to the current

1 stipulation, it might be a different situation than a
2 current regulation. That's very peculiar to me. All
3 right.

4 Any cross-examination?

5 MR. OXFORD: Yes, Your Honor.

6 CROSS-EXAMINATION

7 BY MR. OXFORD:

8 Q Good afternoon, Mr. Funn.

9 A Good afternoon, Mr. Oxford.

10 Q Now, Live365 is proposing an aggregator
11 discount that would be available to anyone who
12 qualifies under its terms, correct?

13 A That's my understanding, yes.

14 Q And there have been other aggregators in the
15 past, haven't there?

16 A Aggregators, yes. I'm not sure if they all
17 are aggregators as they are defined in -- by Live365,
18 but yes.

19 Q And you understand, for instance, LoudCity
20 was an aggregator who at one time paid royalties for
21 services that it provided -- that it streamed,
22 correct?

1 JUDGE WISNIEWSKI: Mr. Oxenford, maybe you
2 need to define what you mean by aggregator in your
3 question; otherwise we're not going to understand what
4 the answer was.

5 BY MR. OXENFORD:

6 Q I'll ask the witness that question.

7 Mr. Funn, an aggregator in your mind is
8 one company that brings together a number of
9 services, streams them and pays the royalties,
10 correct?

11 A That's right.

12 JUDGE WISNIEWSKI: Who is the licensee under
13 that arrangement?

14 THE WITNESS: Whoever is the entity that
15 files for the license.

16 JUDGE WISNIEWSKI: Who typically does in
17 that situation that you just described?

18 THE WITNESS: I mean, we aren't talking
19 about a broad universe of services of that particular
20 category yet. But I think, for the most part, they
21 are the aggregator that sort of files for the license.

22 JUDGE WISNIEWSKI: Thank you.

1 BY MR. OXENFORD:

2 Q Mr. Funn, in Web I, Mark Cuban's
3 Broadcast.com that was acquired by Yahoo and became
4 the basis of the royalties, the benchmark for the
5 royalties set in Web I, that was an aggregator, wasn't
6 it?

7 A I'm not sure.

8 Q You're not familiar with Yahoo at the time
9 of the Web I decision as to whether that was an
10 aggregator?

11 A No. That was before my time, I believe.

12 Q But there have been aggregators in the past?

13 A Yes.

14 Q There is an aggregator now, Live365?

15 A Yes.

16 Q And there is nothing to prevent there being
17 aggregators in the future, correct?

18 A Correct.

19 Q Now, you don't disagree --

20 JUDGE WISNIEWSKI: You're using the term
21 "aggregator" as just described?

22 MR. OXENFORD: Yes.

1 JUDGE WISNIEWSKI: Not in the same sense as
2 in the proposal that you have before us?

3 BY MR. OXENFORD:

4 Q Is there -- Mr. Funn, is there anything that
5 prevents there from being an aggregator in the sense
6 that Live365 uses it in its rate proposal in the
7 future in addition to Live365?

8 A Well, only that, if I understand Live365's
9 proposal correctly, they actually have thresholds in
10 terms of the number of services that must be
11 aggregated in order to meet the definition. So I'm
12 not sure that there have been aggregators that meet
13 that threshold. I just don't know one way or the
14 other.

15 Q But there's nothing that precludes it from
16 happening in the future?

17 A No.

18 Q Now, you don't disagree that --

19 JUDGE WISNIEWSKI: Just a second,
20 Mr. Oxenford.

21 Mr. Funn, you already said you don't
22 know, and maybe this falls into that same category.

1 If it does, that's fine. But under the Live365

2 proposal -- I take it you've looked at it?

3 THE WITNESS: Yes.

4 JUDGE WISNIEWSKI: And who is the licensee

5 under that aggregator portion of the proposal?

6 THE WITNESS: I believe it's Live365 that is

7 purporting to be the licensee.

8 JUDGE WISNIEWSKI: And what is it they're

9 aggregating under that proposal? Do you recall?

10 THE WITNESS: Individual independently

11 operated services.

12 JUDGE WISNIEWSKI: Services. Webcasters?

13 THE WITNESS: Yes.

14 JUDGE WISNIEWSKI: And if they're

15 webcasters, at least under our current regulations,

16 aren't webcasters all licensees?

17 THE WITNESS: I'm not sure. I mean, you can

18 conceive of an instance where I guess they wouldn't

19 technically be considered webcasters in this regard.

20 But you can think of someone who is operating in their

21 basement and just using content that's made available

22 by another service to make the stream, to make it look

1 like they are the service.

2 JUDGE WISNIEWSKI: Makes it look like they
3 are webcasters.

4 THE WITNESS: Right.

5 JUDGE WISNIEWSKI: But they're not actually
6 the webcaster.

7 THE WITNESS: That's right.

8 JUDGE WISNIEWSKI: Thank you.

9 JUDGE ROBERTS: Before you continue on,
10 Mr. Oxenford. Mr. Funn, will you please look at
11 Exhibit 1 of your testimony.

12 THE WITNESS: Sure.

13 JUDGE ROBERTS: Could you tell me where on
14 that Form 1 a service would have to identify itself as
15 an aggregator or not?

16 THE WITNESS: There isn't anywhere on the
17 form that they would have to identify.

18 JUDGE ROBERTS: So if you received a
19 statement of account form from anyone other than
20 Live365, you would have no idea whether that service
21 was an aggregation service or not, correct?

22 THE WITNESS: Not solely based on the

1 statement of account, no.

2 JUDGE ROBERTS: Would that matter to you at
3 all, that you didn't have that information?

4 THE WITNESS: I don't think so, no.

5 JUDGE ROBERTS: So the fact that Live365 is
6 an aggregator was something that was told to you, I
7 presume, rather than something that you got in terms
8 of a submission in your normal course of business at
9 SoundExchange, correct?

10 THE WITNESS: That's right.

11 JUDGE ROBERTS: Okay.

12 CHIEF JUDGE SLEDGE: Let me follow up.
13 Since we're talking about Form 1, let me follow with a
14 question I had on something you said earlier.

15 Where on form -- Form 1 is a form
16 developed by SoundExchange?

17 THE WITNESS: Yes.

18 CHIEF JUDGE SLEDGE: You said you helped
19 build it.

20 THE WITNESS: Yes.

21 CHIEF JUDGE SLEDGE: Where on Form 1 does it
22 provide to state what service is -- it refers to?

1 THE WITNESS: In line 2, we ask to identify
2 the name of the service.

3 CHIEF JUDGE SLEDGE: All right. So when you
4 said earlier that Live365's statement of accounts does
5 not indicate what webcasters are included in the
6 statement of account, then how is that statement of
7 account filled out correctly if it does not indicate
8 what webcasters are included?

9 THE WITNESS: Well, by name of service, our
10 intention is that that name would match whoever the
11 entity is that filed for the license --

12 CHIEF JUDGE SLEDGE: All right.

13 THE WITNESS: -- and that filed a notice of
14 use. So if none of these services that are operating
15 through Live365 filed a notice of use, then we would
16 expect the entity that actually filed the notice to
17 plug in the name here.

18 CHIEF JUDGE SLEDGE: All right. So the
19 reason that's not on there is because you don't ask
20 for that information.

21 THE WITNESS: That's right. Although we
22 do --

1 CHIEF JUDGE SLEDGE: Well, you stated
2 earlier that the reason you're having confusion over
3 knowing -- or a reason why you're having confusion of
4 knowing which of the thousands of webcasters may be
5 noncompliant when Live365 is noncompliant, the reason
6 you don't know that is because your form doesn't ask
7 that.

8 THE WITNESS: That's right. But because the
9 regulations don't require it. So, I mean, we have
10 asked Live365 for the information in the past.

11 CHIEF JUDGE SLEDGE: Well, it's peculiar for
12 you to be complaining about some information that you
13 don't ask for.

14 THE WITNESS: Understood.

15 CHIEF JUDGE SLEDGE: Mr. Oxenford.

16 MR. OXFORD: Thank you.

17 BY MR. OXFORD:

18 Q Mr. Funn, you don't disagree that there are
19 some cost savings for SoundExchange from processing
20 one payment on behalf of hundreds of webcasters as
21 opposed to having to process hundreds of payments from
22 separate webcasters, correct?

1 A Could -- I'm sorry. Could you repeat the
2 question.

3 Q Certainly. You don't disagree that there
4 are some cost savings for SoundExchange to process one
5 payment, one set of records from an aggregator
6 covering hundreds of webcasters, as opposed to
7 handling hundreds of reports and payments from
8 hundreds of separate webcasters?

9 A There may be some cost savings, yes.

10 Q Well, wouldn't it take you more time to
11 process hundreds of reports than it would to process a
12 single report?

13 A Yes. But we also would conceivably get more
14 minimum fees to offset the costs of processing those
15 hundreds --

16 Q My question is solely about costs. There
17 are cost savings for SoundExchange from processing a
18 single report as opposed to hundreds of reports,
19 correct?

20 A Yes.

21 Q Just to make clear, Mr. Funn, Live365 has
22 paid all of its royalties for 2006 to 2010 time

1 period, correct?

2 A I believe so.

3 Q And it paid late fees and interest on those
4 royalties, correct?

5 A Yes. I believe so.

6 Q Now, when you talked about the fact that
7 Live365 at one point had not paid all of the royalties
8 that were due for that 2006 through 2010 time period,
9 Live365 wasn't the only webcaster that was paying at
10 the Web I rates after the Web II decision came out,
11 correct?

12 A That's correct. For some number of months
13 after the Web II rates came down, that's right.

14 Q There were many webcasters that were paying
15 at the Web I rates after the Web II decision while
16 trying to negotiate settlements with SoundExchange,
17 correct?

18 A I'm not sure what you mean by many. There
19 were certainly some.

20 Q Okay. AOL was doing it, weren't they?

21 A For a short period of time, that's right.

22 Q Pandora was doing it, weren't they?

1 A Yeah. For a short period of time.

2 Q Real was doing it, weren't they?

3 A Yes.

4 Q A number of --

5 A For a short period of time.

6 Q A number of small commercial webcasters were
7 paying at earlier rates even after the Web II decision
8 came out; isn't that correct?

9 A Right. But again, I'm not sure if it was
10 for 2-1/2 years.

11 Q In fact, there was a general understanding
12 in the industry, wasn't there, that John Simson, the
13 president of SoundExchange, had told Congress that
14 webcasters who were trying to negotiate a settlement
15 could continue to pay on the old rates while trying to
16 negotiate a settlement of the Web II proceeding with
17 SoundExchange, correct?

18 CHIEF JUDGE SLEDGE: Mr. Freedman.

19 MR. FREEDMAN: Your Honor, I object to
20 asking this fact witness about a general understanding
21 in the industry about a hearsay statement.

22 CHIEF JUDGE SLEDGE: Overruled.

1 THE WITNESS: I'm not sure that's the case,
2 no.

3 BY MR. OXENFORD:

4 Q Well, you saw that statement had been
5 circulated, correct?

6 A I've seen that that statement has been made
7 in blogs.

8 Q Uh-huh. And you never discussed it with
9 anyone at SoundExchange, whether that statement had in
10 fact been made?

11 A I don't recall ever discussing it, no.

12 Q But you knew other services had been paying
13 at the Web I rate after the Web II decision became
14 effective in anticipation of negotiating settlements,
15 correct?

16 A I'm not sure if it was done in anticipation
17 of settlement. I mean, there were a number of
18 services soon after the Web II rates came down that
19 continued to pay at the Web I rates. For most of
20 them, we told them -- or for a good many of them we
21 told them that they needed to begin paying. And for a
22 large portion of that, they started paying at the

1 right rates.

2 Q And did any of them ever come back to you
3 and say, well, we're waiting until we can see whether
4 we can negotiate a settlement?

5 A I don't know. I don't think anybody ever
6 told that to me specifically, not that I recall at
7 least.

8 Q You knew that there were settlement
9 discussions ongoing with Live365, correct?

10 A I knew that there were discussions.

11 Q In fact, you were in a meeting about
12 settlements of the Web II royalty dispute as of
13 July 2009 with Live365 and SoundExchange, correct?

14 A Yes. I was certainly in on some discussions
15 with Live365.

16 Q Okay. Now, in your testimony, you talk
17 about doctored statements.

18 A Yes.

19 Q The sole extent of the doctoring was the
20 fact that they were paying at the Web I rates after
21 the Web II rates became effective, correct?

22 A I -- I suppose so, yes.

1 Q And you knew that's what they were doing,
2 correct?

3 A Yes. After seeing the statement of account,
4 yes.

5 Q Live365 wasn't hiding that that's what they
6 were doing, correct?

7 A No. But there was an expectation that they
8 would eventually start paying the rates.

9 Q Now, at the top of page 2 of your statement,
10 you talk about some letters that you wrote to Live365.

11 A Yes.

12 Q Now, you've written letters to other
13 webcasting services about compliance issues, correct?

14 A That's right.

15 Q And you've otherwise contacted other
16 webcasting services about compliance issues, either
17 through e-mail or by telephone, correct?

18 A Yes.

19 Q And in fact in the year 2009, you contacted
20 over 600 webcasting services about some compliance
21 questions or issues that you had, correct?

22 A That's right.

1 MR. OXENFORD: Your Honor, I would like to
2 put before the witness a document that was produced in
3 discovery in this proceeding and has been premarked as
4 Live365 Rebuttal Exhibit Number 3.

5 BY MR. OXENFORD:

6 Q Can you take a moment to look at that,
7 Mr. Funn.

8 A Please. Okay.

9 Q Do you recognize that as a document that was
10 produced in discovery in this proceeding?

11 A Yes.

12 Q And that's a document that identifies the
13 services that you contacted in 2009 about compliance
14 issues, correct?

15 A That's what it looks like, yes.

16 Q And this is a document that was prepared
17 from SoundExchange records, correct?

18 A Yes.

19 MR. OXENFORD: Your Honor, I ask that this
20 be admitted into evidence as Live365 Rebuttal Exhibit
21 Number 3.

22 CHIEF JUDGE SLEDGE: Any objections to the

1 exhibit?

2 MR. FREEDMAN: No, Your Honor.

3 CHIEF JUDGE SLEDGE: Without objection, it's
4 admitted.

5 (Live365 Exhibit Number 3 was received into
6 evidence.)

7 MR. OXENFORD: Thank you.

8 BY MR. OXENFORD:

9 Q Mr. Funn, isn't it true that noncompliance
10 issues are not limited to just aggregators?

11 A That is true.

12 Q SoundExchange has many categories of
13 webcasters that are paying royalties to it, correct?

14 A Yes.

15 Q Categories established by different royalty
16 rates or different agreements?

17 A That's right.

18 Q And, in fact, if you look at that list
19 that's just been admitted, there are webcasters in
20 virtually every category that are in -- that have some
21 compliance issues, correct?

22 A Correct.

1 Q Now, one of your jobs as manager of
2 licensing and enforcement at SoundExchange, because
3 services sometimes have compliance issues, correct?

4 A That's right. But by compliance issues,
5 it's typically a month goes by where they give us a
6 payment but they failed to give us a statement of
7 account. Or, you know, the amounts don't add up. So
8 the check will say one amount and the statement of
9 account won't match that. I can't think of an
10 instance with a service on this list that paid at the
11 old rate for 2-1/2 years.

12 Q But that's your job is to do enforcement,
13 correct?

14 A That's true, yes.

15 Q Do you know whether ASCAP and BMI have folks
16 that do enforcement, similar to what you do?

17 A I don't know about similar to what I do, but
18 I am aware that ASCAP and BMI have enforcement type of
19 activities.

20 Q And they have enforcement personnel,
21 correct?

22 A That's my understanding.

1 Q Yet, they provide an aggregator discount,
2 don't they?

3 A I don't know.

4 Q Don't know. You didn't see that in
5 Dr. Fratrik's testimony?

6 A I don't recall seeing it.

7 Q Now, in your -- to follow up on Judge
8 Sledge's questions, where you complain about Live365
9 not providing SoundExchange with a list of the
10 thousands of webcasters that it aggregates, there's no
11 requirement, is there, that Live365 provide that
12 information to SoundExchange under the current
13 regulations?

14 A That's right.

15 CHIEF JUDGE SLEDGE: Under the current
16 regulations. Are you suggesting that there's a
17 regulation that authorizes someone to file a statement
18 of account for someone else without identifying the
19 someone else?

20 THE WITNESS: No. I'm suggesting that a
21 service that purports to operate under the statutory
22 license is not necessarily required to identify the

1 individual channels or stations that are being
2 streamed by that entity.

3 CHIEF JUDGE SLEDGE: What is box 4 on tab 2?

4 THE WITNESS: Box 4 on tab 2?

5 CHIEF JUDGE SLEDGE: I'm sorry. Tab 1.

6 THE WITNESS: I don't believe that this is a
7 requirement. This is just something that we ask for.
8 I'm not sure this is required by the regulations. The
9 service is required to be identified, but not
10 necessarily the channels.

11 CHIEF JUDGE SLEDGE: Right. But it's your
12 testimony that the regulations permit someone to file
13 a statement on account for someone else, even though
14 box 4 indicates that the station/channel name, for
15 example, call letters, is on your form to be filled
16 out?

17 THE WITNESS: Yes. Not everyone fills this
18 box in, I guess is my testimony.

19 CHIEF JUDGE SLEDGE: All right.

20 BY MR. OXENFORD:

21 Q Thank you, Your Honor. In fact that form,
22 tab 1, it's not required that services use that form,

1 is it?

2 A No. Not currently, no.

3 JUDGE ROBERTS: Mr. Funn, with respect to,
4 I'm looking at tab 2, Live365. And this form here is
5 a different-looking form than the one that you have in
6 tab 1.

7 THE WITNESS: That's right.

8 JUDGE ROBERTS: Is the one that you have in
9 tab 1 the current form that you're using? And what is
10 tab 2, a previous form?

11 THE WITNESS: I believe that's right. Yes.

12 JUDGE ROBERTS: Okay. And in neither of
13 these forms, at least with respect to Live365, do you
14 ask the service to identify all those webcasters that
15 it is filing a statement of account for, correct?

16 THE WITNESS: Well, again, we ask them for
17 the information on tab 1. But I don't believe that
18 they are required to give it to us.

19 JUDGE ROBERTS: Well, you ask
20 station/channel name.

21 THE WITNESS: Right.

22 JUDGE ROBERTS: But that isn't the same as

1 asking the question of who are you filing on behalf
2 of, as would be the case of Live365? Are these -- do
3 you equate the two? That if it's a station, then
4 it -- it should be a long list of the hundreds and
5 hundreds of webcasters that Live365 aggregates?

6 THE WITNESS: Sure. I mean, if that's how
7 they identify the stations, then yes.

8 JUDGE ROBERTS: Well, let me ask you this.
9 Is that what you're looking for in box 4?

10 THE WITNESS: Well, that's what we're
11 looking for in the attachment to the back of the
12 statement of account form.

13 JUDGE ROBERTS: That's page 3?

14 THE WITNESS: Yes. I'm sorry. Page 3.

15 JUDGE ROBERTS: Okay. So if you receive a
16 statement of account from Live365, and page 3 is
17 blank, do you ask for more information?

18 THE WITNESS: Every month? No.

19 JUDGE ROBERTS: No. Why not?

20 THE WITNESS: Because I don't think it's
21 required by the regulations.

22 JUDGE ROBERTS: So you would say that you

1 would only get that information if it's required by
2 regulation? So right here, box 4 is wishful thinking?

3 THE WITNESS: It's --

4 JUDGE ROBERTS: You're hoping to get
5 something from each filer.

6 THE WITNESS: I think so, yes.

7 JUDGE ROBERTS: All right.

8 THE WITNESS: It certainly would help us to
9 know that information, but I don't think it's
10 currently required.

11 JUDGE ROBERTS: Okay.

12 CHIEF JUDGE SLEDGE: Just what would appear
13 to be an obvious question from your answers, you say
14 that your statement of account tells you what rate
15 applies.

16 THE WITNESS: Yes.

17 CHIEF JUDGE SLEDGE: If your statement of
18 account doesn't identify the webcaster, how do you
19 know what rate applies?

20 THE WITNESS: I'm not sure I understand your
21 question, Your Honor.

22 CHIEF JUDGE SLEDGE: Well, if your statement

1 of account includes hundreds of different kinds of
2 webcasters who fit under different rates --

3 THE WITNESS: Right.

4 CHIEF JUDGE SLEDGE: -- then how do you know
5 whether the statement of account is correct, or how do
6 you check it for compliance and enforcement if you
7 don't know what rate applies to the services that are
8 listed on your statement of account?

9 THE WITNESS: Sure. The services
10 self-identify what rates and terms that they want to
11 operate under.

12 CHIEF JUDGE SLEDGE: Well, you don't ask
13 them. You don't ask that question.

14 THE WITNESS: Sure. By filing the statement
15 of account, they are asserting what rate and term they
16 intend to operate under.

17 CHIEF JUDGE SLEDGE: Where?

18 THE WITNESS: If we get, for example, this
19 form, it's our understanding that they are operating
20 under the -- the rates available under 37 CFR
21 part 380.

22 CHIEF JUDGE SLEDGE: Which service is that?

1 THE WITNESS: They're commercial or
2 noncommercial webcasters that are operating under the
3 rates and terms adopted by the copyright royalty
4 judges.

5 CHIEF JUDGE SLEDGE: The rate for commercial
6 and noncommercial is the same?

7 THE WITNESS: No, it's not the same. But
8 there's also a noncommercial webcaster form like this,
9 too.

10 CHIEF JUDGE SLEDGE: And that's supposed to
11 be divided?

12 THE WITNESS: Yes. There's a separate form
13 for noncommercial webcasters.

14 CHIEF JUDGE SLEDGE: Do you get such a
15 separate form from Live365?

16 THE WITNESS: For noncommercial webcasters?

17 CHIEF JUDGE SLEDGE: Yes.

18 THE WITNESS: No.

19 CHIEF JUDGE SLEDGE: Are you aware that
20 Live365 has clients or customers that are
21 noncommercial webcasters?

22 THE WITNESS: I don't know. I'm not sure.

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1 They don't tell us who their services are.

2 CHIEF JUDGE SLEDGE: And you don't ask them?

3 THE WITNESS: We have asked in the past.

4 They just haven't furnished that information.

5 CHIEF JUDGE SLEDGE: But your statement of
6 account doesn't ask them.

7 THE WITNESS: It asks voluntarily by page 3.

8 CHIEF JUDGE SLEDGE: All right. I'm shaking
9 my head because it's -- it strikes me as awful strange
10 for you to be complaining about this way of doing
11 business that satisfies what you require.

12 Mr. Oxenford.

13 MR. OXFORD: Thank you, Your Honor. Just
14 final --

15 JUDGE ROBERTS: Before you go on,
16 Mr. Oxenford.

17 Mr. Funn, you have a statement of
18 account for commercial webcasters, you have a
19 statement of account for noncommercial webcasters.
20 Do you have any other statement of account forms
21 that you use?

22 THE WITNESS: Yes. We have statements of

1 account for each of the various categories of entities
2 that operate under statutory license. So, you know,
3 preexisting services, satellite digital audio radio
4 services, business establishment services. Various
5 rates and terms available under the Webcaster
6 Settlement Act.

7 We have statements of account for all of
8 those categories.

9 JUDGE ROBERTS: Okay. The ones that you
10 were relating after commercial and noncommercial were
11 applicable to different statutory licenses until you
12 got to the last one, where you talked about webcasters
13 operating under the Webcaster Settlement Act.

14 It would be helpful if you submitted all
15 your current statement of account forms --

16 THE WITNESS: Okay.

17 JUDGE ROBERTS: -- to us, so that we could
18 see each one -- just for the purposes of this license.

19 THE WITNESS: Okay.

20 JUDGE ROBERTS: We don't need to know a
21 preexisting subscription service, for example.

22 THE WITNESS: Got it.

1 JUDGE ROBERTS: Just the ones applicable to
2 this proceeding, what are the current forms that you
3 are using.

4 THE WITNESS: Okay.

5 JUDGE ROBERTS: Thank you.

6 BY MR. OXENFORD:

7 Q Mr. Funn, just so the record is clear, a
8 webcaster need not use that form as long as it
9 provides you with the required information, correct?

10 A Currently that is the case.

11 Q Now, with respect to the last paragraph on
12 page 4, to follow up on Judge Roberts' questions, that
13 minimum fee cap is available to all commercial
14 webcasters, correct?

15 A That's my understanding, yes, currently.

16 Q And that's based on channels, correct?

17 A Channels or stations.

18 Q So any webcaster with over a hundred
19 channels, whether or not they're an aggregator, gets
20 that discount, correct?

21 JUDGE WISNIEWSKI: How are you defining
22 aggregator, Mr. Oxenford, again?

1 MR. OXFORD: I'll define -- I'll ask that
2 question without using the word.

3 BY MR. OXFORD:

4 Q So any webcaster who has over a hundred
5 channels gets that discount, correct?

6 A That is correct.

7 MR. OXFORD: No further questions, Your
8 Honor.

9 CHIEF JUDGE SLEDGE: Mr. Freedman, any
10 questions?

11 JUDGE ROBERTS: You forgot Mr. Malone.

12 CHIEF JUDGE SLEDGE: I'm sorry. I'm getting
13 my horses backwards. That's a bad analogy.

14 MR. FREEDMAN: I won't take that personally.

15 CHIEF JUDGE SLEDGE: I'll start over again.
16 Mr. Malone, any questions?

17 MR. MALONE: Yes, please, Your Honor. I
18 think I should take that as a compliment.

19 CROSS-EXAMINATION

20 BY MR. MALONE:

21 Q Good afternoon, Mr. Funn.

22 A Good afternoon.

1 Q I'm Bill Malone, representing

2 Intercollegiate Broadcasting System.

3 In your testimony and in your written
4 statement at several different places there are
5 different numbers ranging from 100 to 6,000
6 webcasters. And I would ask you to go through these
7 appearances with me and explain what the basis of
8 the numerical value is.

9 On page 1, in the fourth -- the fifth
10 line from the bottom, fifth and sixth lines from the
11 bottom, you refer to at least 100 independently
12 operated aggregated webcasters. And what is the
13 meaning of that and from where is it derived?

14 A It's derived from Live365's proposal.

15 Q And that's the basis for it?

16 A Yes.

17 Q One --

18 A I believe it's a direct quote from the
19 proposal.

20 Q I'm sorry. On page 2, in the sixth line
21 from the bottom, you have the phrase "thousands of
22 webcasters." And what's the basis for the numerical

1 value there?

2 A It's based on my understanding of the number
3 of individual stations that Live365 is purporting to
4 operate on behalf of.

5 Q Do you have any more precise understanding
6 than just thousands?

7 A Last I checked the number was around 6,000,
8 I believe, but I don't know if that's changed.

9 Q Well, one of the trade publications uses a
10 slightly larger figure last week, but we'll let that
11 go for the moment.

12 A Okay.

13 Q At the bottom of page 4, the fourth line
14 from the bottom, you say, "service such as Live365
15 that aggregates thousands of stations." What is the
16 source of the numerical value there?

17 A Same thing. My understanding of the number
18 of stations that Live365 purports to operate on behalf
19 of.

20 Q And what was the basis of that
21 understanding?

22 A I don't recall precisely. It may have been

1 based on public statements that Live365 may have made
2 on its web site. I just don't recall.

3 Q Also, at the bottom of page 4, there is the
4 figure 5,000 stations.

5 A Where are you? Oh, I see. Okay.

6 Q And what is the basis for the numerical
7 value there?

8 A Again, it would be my rough understanding
9 of -- I mean, it's supposed to provide an example.
10 So -- I mean, it could have been 7,000. It could have
11 been, I don't know, 5,500.

12 Q And then in answering a question from
13 Mr. Oxenford, you referred to Live365's providing
14 housing for 6,000 webcasters. And what's the basis of
15 that numerical understanding?

16 A Again, I don't recall exactly. It may have
17 been information that I derived off of the Live365 web
18 site at some point in time.

19 MR. MALONE: Thank you.

20 CHIEF JUDGE SLEDGE: Any redirect?

21 MR. FREEDMAN: Your Honor, may I have one
22 moment?

1 CHIEF JUDGE SLEDGE: All right.

2 Mr. Freedman, I'm sorry.

3 MR. FREEDMAN: Yes, Your Honor. I have a
4 couple of questions very briefly.

5 CHIEF JUDGE SLEDGE: All right.

6 MR. FREEDMAN: Thank you.

7 REDIRECT EXAMINATION

8 BY MR. FREEDMAN:

9 Q Mr. Funn, one of the things that
10 Mr. Oxenford asked you about was, after the Web II
11 decision was issued, whether there were other services
12 in addition to Live365 that didn't pay at the Web II
13 rates. Do you recall that?

14 A Yes.

15 Q Did any of them fail to pay at the right
16 rates for 2-1/2 years other than Live?

17 A No.

18 Q Within 8 months after the Web II decision,
19 were those services paying at the correct rates?

20 A The majority of them were at least, yes.

21 Q Now, another thing that Mr. Oxenford asked
22 you about and in fact the judges asked you about was

1 the question of Live365 providing a list of the
2 various stations or services that it reports for; is
3 that right?

4 A Yes.

5 Q Has SoundExchange asked Live for a list more
6 than once?

7 A Yes.

8 Q Has Live provided that list?

9 A To my knowledge, they haven't yet.

10 MR. FREEDMAN: Nothing further, Your Honor.

11 CHIEF JUDGE SLEDGE: Thank you.

12 MR. FREEDMAN: Thank you, Your Honor.

13 CHIEF JUDGE SLEDGE: Any further cross?

14 MR. OXENFORD: Yes, Your Honor. Just one
15 question.

16 RECROSS-EXAMINATION

17 BY MR. OXENFORD:

18 Q Mr. Funn, through summer of 2009, there were
19 other services that were not paying at the full Web II
20 rates, correct?

21 A Through summer of 2009?

22 Q Correct.

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1 A I don't know precisely. I'm not sure.

2 Q Well, Pandora, for instance, was not paying
3 at the Web II rates until after the webcaster
4 settlement agreement was -- agreements were enacted,
5 correct?

6 A It was sometime in the summer.

7 Q Small commercial webcasters were not paying
8 until after the webcaster settlement agreement was
9 enacted, correct?

10 A Some may have. I wouldn't say that all of
11 them weren't.

12 MR. OXENFORD: That's all. Thank you, Your
13 Honor.

14 CHIEF JUDGE SLEDGE: Mr. Funn, direct your
15 attention to the stipulation that's -- that you refer
16 to on page 4 of your testimony.

17 THE WITNESS: Okay.

18 CHIEF JUDGE SLEDGE: Are you aware of any
19 customers of Live365 that are not webcasters?

20 THE WITNESS: I'm not aware one way or the
21 other. So I guess to answer your question, no, I'm
22 not aware.

1 CHIEF JUDGE SLEDGE: Your answer is more
2 complete than the question asked for. So you're not
3 aware of whether the customers of Live365 are
4 webcasters or not?

5 THE WITNESS: All of them? No.

6 CHIEF JUDGE SLEDGE: Now, the stipulation
7 provides that all commercial webcasters pay a minimum
8 fee of \$500.

9 THE WITNESS: Yes.

10 CHIEF JUDGE SLEDGE: Is there any exception
11 in that stipulation for webcasters that are customers
12 of Live365?

13 THE WITNESS: I don't have the stipulation
14 in front of me, but I don't think so, no.

15 CHIEF JUDGE SLEDGE: Any other questions?

16 JUDGE ROBERTS: Yes. Mr. Funn, you're the
17 witness that is here on behalf of SoundExchange to
18 support the request for a term -- adoption of a term
19 that all webcasters would submit statements of account
20 on a form provided by SoundExchange; isn't that
21 correct?

22 THE WITNESS: Yes.

1 JUDGE ROBERTS: And this particular form
2 that you have at tab 1, this is a form that you
3 yourself have worked on?

4 THE WITNESS: Yes, along with others at
5 SoundExchange, but yes.

6 JUDGE ROBERTS: And in the years that you've
7 been at SoundExchange and the years that SoundExchange
8 has been collecting royalties, for how long a period
9 of time has there been a preset form? Is this
10 something that's brand-new, or it's something that
11 SoundExchange has been doing for a while?

12 THE WITNESS: It's certainly something that
13 SoundExchange has been doing for a while. If I
14 remember correctly, under the old regulations, I think
15 the statement of account was required to be on a form
16 that -- provided by SoundExchange, or something to
17 that effect. And I'm referring to the CARP
18 regulations.

19 JUDGE ROBERTS: Now, this form that you have
20 in tab 1 is marked 2009.

21 THE WITNESS: Yes.

22 JUDGE ROBERTS: The 2008 form, is that a

1 little different?

2 THE WITNESS: I haven't looked at the 2008
3 form in a while. But I imagine that it is slightly
4 different.

5 JUDGE ROBERTS: Okay. This form at tab 2
6 that was submitted by Live365, do you know from what
7 year that format is from for a form?

8 THE WITNESS: Not precisely, no. If I had
9 to guess, I would say 2005, but I don't know that to
10 be the case.

11 JUDGE ROBERTS: Okay. So the form changes
12 over a period of time?

13 THE WITNESS: Yes.

14 JUDGE ROBERTS: And what's the reasons for
15 the form changing?

16 THE WITNESS: One reason is because the rate
17 changes every year.

18 JUDGE ROBERTS: Okay. Is there anything
19 else? Are there new categories of information that
20 you add or subtract from one year to the next?

21 THE WITNESS: Yeah. I mean, over time,
22 we've sort of tweaked the form slightly in terms of

1 formatting, just to make it easier for us to process
2 the information and to make it easier for the services
3 to input the information.

4 Outside of that, I'm not sure that
5 there's any extra information that's being asked for
6 unless that information is also required by the
7 regulations, with the exception of the
8 station/channel name.

9 JUDGE ROBERTS: Is this form that you
10 submitted in tab 1, other than, of course, the rates,
11 which I understand do change, but other than the
12 rates, is this a form that SoundExchange is
13 comfortable with and intends to use into the future,
14 regardless of how we rule on whether we will accept
15 the term using your -- having to use your forms?

16 THE WITNESS: Assuming that the structure of
17 the rates and terms stay relatively constant, then I
18 think that this, at least the information within will
19 be sufficient. I mean, obviously if, you know, terms
20 change and additional information is required, we
21 would want to add that to the form.

22 JUDGE ROBERTS: Well, I understand that.

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1 But, again, just aside from the rates changing, is
2 there information on this form that you would like to
3 add to or expand upon or remove in the future? In
4 other words, are you happy with this form right now?

5 THE WITNESS: I'm pretty happy with this
6 form.

7 JUDGE ROBERTS: Okay. Do you have any idea
8 what percentage, approximately what percentage of
9 webcasters that currently file under this license use
10 the form that you have offered on your web site?

11 THE WITNESS: One of the forms that we
12 offer?

13 JUDGE ROBERTS: Yes.

14 THE WITNESS: Or this specific form?

15 JUDGE ROBERTS: Let's take the category of
16 commercial webcasters.

17 THE WITNESS: Okay.

18 JUDGE ROBERTS: How many of the commercial
19 webcasters that file statements of account with you
20 use one of these forms? Approximately.

21 THE WITNESS: I don't -- I don't know
22 precisely.

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1 JUDGE ROBERTS: Is it less than half?

2 THE WITNESS: It's much more than half, I
3 would imagine.

4 JUDGE ROBERTS: It's much more than half?

5 THE WITNESS: That use the SoundExchange
6 form?

7 JUDGE ROBERTS: Yes.

8 THE WITNESS: Yes.

9 JUDGE ROBERTS: And what about noncommercial
10 webcasters?

11 THE WITNESS: It's probably around the same,
12 I would imagine.

13 JUDGE ROBERTS: So it's --

14 THE WITNESS: Much more than half.

15 JUDGE ROBERTS: Much more than half. And
16 this is available on your web site. And that's where
17 most people get it, I presume.

18 THE WITNESS: That's right. At least that's
19 my understanding, that's where they get it from.

20 JUDGE ROBERTS: All right. Thank you.

21 THE WITNESS: You're welcome.

22 CHIEF JUDGE SLEDGE: Judge Wisniewski.

1 JUDGE WISNIEWSKI: No.

2 CHIEF JUDGE SLEDGE: Thank you, sir. That
3 completes your testimony. You're excused.

4 THE WITNESS: Thank you.

5 CHIEF JUDGE SLEDGE: Anything else by
6 SoundExchange?

7 MR. HANDZO: No, Your Honor. That completes
8 SoundExchange's evidence. I do have one housekeeping
9 matter when the Court is ready for it.

10 CHIEF JUDGE SLEDGE: All right. Is there
11 anything else by 365 to present?

12 MR. OXENFORD: No, Your Honor.

13 CHIEF JUDGE SLEDGE: Mr. Malone.

14 MR. MALONE: No, Your Honor.

15 CHIEF JUDGE SLEDGE: All right. Mr. Handzo.

16 MR. HANDZO: Your Honor, with respect to
17 exhibits, as we have in the past, the parties have
18 agreed that we will get together, collect all the
19 exhibits that have been submitted and then provide a
20 set to the Court. If the Court wants to proceed that
21 way in this case as we have in the past, then our plan
22 was to provide those exhibits to the Court at the time

1 we file our proposed findings of fact. But if the
2 Court wants them at some earlier or some later date,
3 we obviously will accommodate that.

4 CHIEF JUDGE SLEDGE: You know, I'm drawing a
5 blank. I was -- when you started asking that
6 question, isn't that required by our regulations, that
7 you do that on the exhibits?

8 MR. HANDZO: I actually don't think so. I
9 think it's always been the practice. I don't know
10 that it's --

11 CHIEF JUDGE SLEDGE: I thought that the
12 regulations said that the exhibit proponent was
13 required to maintain the original and submit it after
14 the close of the evidence. But I -- I'm not sure it
15 matters. But I just -- I just --

16 MR. HANDZO: I don't know. The crack legal
17 team is figuring that out. But in the meantime --

18 CHIEF JUDGE SLEDGE: I think it's -- our
19 present system is fine.

20 MR. HANDZO: Okay. And is getting them at
21 the time of the findings of fact sufficient?

22 CHIEF JUDGE SLEDGE: Yes.

1 MR. HANDZO: Thank you.

2 CHIEF JUDGE SLEDGE: All right. Then we
3 have completed the direct phase. We've completed the
4 rebuttal phase. We have received all of the
5 information requested from the parties with the
6 exception outstanding of additional forms, template
7 forms from SoundExchange pursuant to the last
8 testimony.

9 Given that, then it appears that all has
10 been presented by the parties on the record and the
11 record is closed. That completing the rebuttal
12 phase, we can be adjourned. Thank you.

13 (Whereupon, at 3:03 p.m., the hearing was
14 concluded.)

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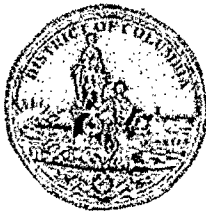
1 C E R T I F I C A T E

2 I, Vicky Reiner, RMR, CRR, and Notary Public
3 for the District of Columbia, duly commissioned and
4 qualified, do hereby certify that the proceedings in
5 the cause aforesaid was taken down by me in stenotype
6 and subsequently transcribed into English text, and
7 that the foregoing is a true and accurate transcript
8 of the proceedings so held.

9 I do hereby certify that the proceedings
10 were taken at the time and place as specified in the
11 foregoing caption.

12 I do hereby further certify that I am in
13 no way interested in the outcome of this action.

14 In witness whereof, I have hereunto
15 signed my name this 16th day of August, 2010.



Vicky Reiner
Vicky Reiner
Notary Public
for the District of Columbia

20 My Commission expires:
21 September 30, 2012
22

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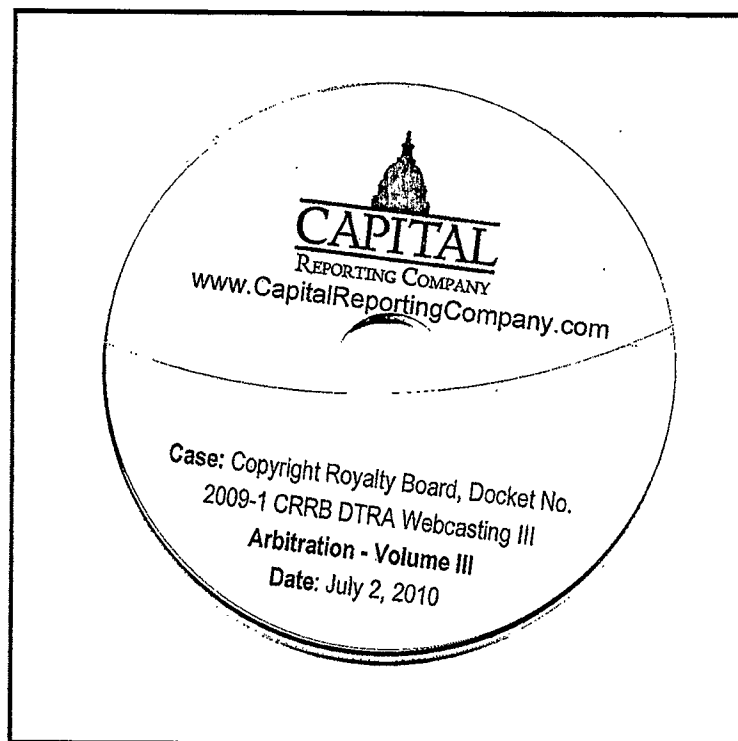
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